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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 875

SWIFT & COMPANY, ARMOUR AND COMPANY, and THE CUDAHY PACKING COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Northern District of Illinois

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 189 F. Supp. 885, and a copy appears in the separate Appendix filed herewith (Op., App. 1-57). By its terms this opinion stands as the court's findings of fact and conclusions of law (Op., App. 57).

JURISDICTION

This suit originated with the filing by the Government of a petition in equity (Complaint, App. 58-85) on February 27, 1920, under Section 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. § 4. A consent decree (Decree, App. 86-104) was entered the same day by the Supreme Court of the District of Columbia.

The instant modification proceedings were commenced in November and December, 1956, when appellants Swift, Armour and Cudahy filed separate petitions for modification of the decree. All petitions were filed in the United States District Court for the District of Columbia, and the cause was thereafter transferred in its entirety to the District Court for the Northern District of Illinois, Eastern Division, on January 15, 1958, pursuant to the provisions of Section 1404(a) of the Judicial Code, 28 U.S.C. § 1404(a).

Following a trial, the latter district court entered judgment on December 12, 1960, denying the petitions in their entirety (App. 57A). The notice of appeal was filed in that court on February 8, 1961. The jurisdiction of this Court to review the judgment by direct appeal is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U.S.C. § 29. The following decisions sustain the jurisdiction of this Court to review the judgment by direct appeal: *United States v. Swift & Co.*, 286 U.S. 106 (1932); *Hughes v. United States*, 342 U.S. 353 (1952); *Chrysler Corp. v. United States*, 316 U.S. 556 (1942).

STATUTES INVOLVED

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2, 4, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor . . . .

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . .

* * *

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations.

QUESTIONS PRESENTED

A forty-year old antitrust consent decree prohibits appellants from engaging in the otherwise lawful competitive activities of manufacturing, wholesaling or retailing of groceries and certain other products, selling fresh milk and cream, or operating retail meat markets. The district court denied relief from any of these prohibitions. The following questions are presented by this appeal:

1. Whether the district court applied erroneous legal standards for consent decree modification by determining: that such standards are more stringent than those applicable to a litigated decree; that a consent decree is a bargain which should not be modified by the court as long as the defendant retains the original consideration received in the settlement; that appellants in 1920 bargained away their right to engage in the activities prohibited by the decree in supposed consideration for retaining their size as meat packers; that appellants' size is synonymous with the danger of competitive abuse; and that the Supreme Court's decision in *United States v. Swift & Co.*, 286 U.S.

106, deprived the court of discretion to modify the decree as long as appellants continue to be large meat packers.

2. Whether the district court erred as a matter of law in failing to conclude that the dangers to competition against which the aforesaid decree prohibitions were directed were the ability of appellants in 1920 to distribute groceries through their meat distribution systems at substantially no increase in overhead expense and the danger that appellants would use this advantage to engage in predatory price cutting so as to eliminate competition, in light of their then ability to utilize their positions in the meat industry to force their customers to buy groceries from them in order to obtain meats, and whether the district court erroneously denied modification of the consent decree since its findings and the undisputed evidence show that these dangers to competition no longer exist.

3. Whether the district court erred in denying relief from each of the decree provisions which bar appellants from: (a) manufacturing or processing the prohibited commodities, (b) wholesaling or distributing the prohibited commodities, (c) operating retail food stores for the sale of the prohibited commodities and meats, or (d) selling and distributing fresh milk and cream, since the court made no finding that appellants would adversely affect competition by manufacturing the prohibited commodities, and its findings as to wholesaling, the operation of retail food stores and selling fresh milk and cream are inconsistent with denial of relief.

4. Whether the district court erroneously concluded that a showing of hardship to petitioners from the continued existence of the decree was a necessary requirement for its modification, and further erred in failing to find that petitioners have shown hardship stemming from changes in conditions which entitle them to modification.

STATEMENT

This case presents the broad question of the proper test for modification of antitrust consent decrees which prohibit otherwise lawful business activities. The injunctive restraints which the district court has refused to remove have been in force for over forty years. They exclude appellants from extensive areas of the nation's food industry. As continuing prohibitions of otherwise completely lawful competitive business endeavor, the restraints undoubtedly are among the most sweeping ever entered under the Sherman Act. Unlike antitrust decrees restraining only illegal practices, the continuation of consent decrees enjoining otherwise lawful business activity after the original need has been dissipated through changed economic conditions, transforms such decrees from guardians against competitive abuse into hobbles upon free competition. If the objectives of the antitrust laws are not to be perverted, such decrees must be modified whenever it is affirmatively shown that extraordinary restraints are no longer needed to protect the public against the dangers which originally evoked them. The district court ignored these fundamental principles and denied relief in the face of extensive evidence and its own findings demonstrating that those dangers no longer exist.

1. The Origin of the Consent Decree Entered in this Case

This case originated on February 27, 1920, with the filing of a petition in equity (Complaint, App. 58) by the Government under the Sherman Act against the then five leading meat packers, Swift & Company, Armour and Company, Wilson & Company, the Morris Packing Company and The Cudahy Packing Company, together with their subsidiaries and principal executives. The charge was that the defendants had achieved a monopoly in the meat packing

industry through combination and conspiracy, including agreements apportioning livestock purchases among themselves, the acquisition and control of stockyards and stockyard terminal railroads, the purchase of trade papers and journals and other devices aimed at unified control of the meat industry. Having eliminated competition in meat products, the defendants, according to the complaint, were attempting to extend their monopoly into so-called "substitute" foods, *i.e.*, non-meat groceries. The means used by the defendants to achieve this objective were alleged as follows:

> "To accomplish this purpose the defendants availed themselves of the advantages afforded by the refrigerator cars, route cars, auto trucks, branch houses, and storage warehouses owned or controlled by them. These facilities intended primarily for the sale of meats were employed with comparatively no increase of overhead in the distribution of the substitute foods and unrelated commodities. The defendants were enabled thereby to reach remote spots. This advantage was also employed temporarily to fix prices so low as to gradually eliminate competition" (Complaint, App. 78).

Through their 1,120 branch houses, 1,297 railroad route cars, fleets of auto trucks and other facilities, and through their extensive branch house sales forces, defendants were in a unique position to reach retail food stores in thousands of towns throughout the nation (Complaint, App. 72-74, 78). As indicia of the extent to which the monopolistic attempts had been successful, the complaint cited the growth and profits of the defendants and the number of companies they controlled (Complaint, App. 79-80). The Government's complaint prayed for specific injunctive relief aimed at ending the alleged monopoly in meat and the attempted monopoly in other fields. Although the defendants, in their answers denied the material allegations of

the complaint, they consented to the entry of a decree conforming in substantially all respects to the Government's prayer.

The consent decree (Decree, App. 86) enjoined the defendants from combining or conspiring to restrain or to monopolize trade, attempting to monopolize or monopolizing trade or engaging in any illegal trade practice (paragraphs First and Ninth). In addition, defendants were enjoined from holding any interest in public stockyard companies, stockyard terminal railroads or market newspapers (paragraphs Second and Tenth), or in public cold storage warehouses (paragraph Seventh), from engaging in the manufacture, distribution and sale of over 140 categories of grocery and miscellaneous products (paragraphs Third and Fourth), from owning and operating or conducting retail meat markets (paragraph Sixth), and from distributing and selling fresh milk and cream (paragraph Eighth).

2. The Prior Proceedings for Modification of the Consent Decree[1]

In 1929, a proceeding to modify portions of the consent decree was commenced in the Supreme Court of the District of Columbia by Swift, Armour and their respective subsidiaries.[2] That court modified the decree so as to permit

[1] On a motion by an intervenor, California Cooperative Canneries, to vacate the decree, the Supreme Court of the District of Columbia suspended the operation of the decree on May 1, 1925. Thereafter the legal validity of the decree was sustained in Swift & Co. v. United States, 276 U.S. 311 (1928), and the decree was restored to force on July 24, 1929, by the district court on mandate from this Court in United States v. California Cooperative Canneries, 279 U.S. 553 (1929).

[2] Of the five principal defendants named in the original suit, Morris had discontinued its business and sold its assets to Armour in 1923, and Wilson and Cudahy did not join in the 1929 petition

defendants to manufacture and wholesale the prohibited commodities, but in all other respects continued the decree in force as originally entered.

On appeal in *United States v. Swift & Co.*, 286 U.S. 106 (1932), the Supreme Court reversed the order modifying the decree and dismissed the defendants' petitions. The Court was "not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent" (*Id.* at 114). Rather the case turned on "whether enough has been shown to justify its exercise" (*Id.* at 115). Defendants asserted that changed conditions in the food industry since the entry of the decree made continuation of its restraints no longer necessary. To the Court, "the inquiry for us is whether the changes are so important that dangers, once substantial, have become attenuated to a shadow" (*Id.* at 119).

In light of the evidence then before it, this Court concluded that the dangers to competition in the grocery field against which the decree was directed were still substantial. It observed that, "two reasons, and only two, for exacting the surrender of this adjunct of the business were stated in the bill of complaint," and that, "whatever persuasiveness the reasons then had," was "theirs with undiminished force" on the record before it (*Id.* at 115). "The first was that through the ownership of refrigerator cars and branch houses as well as other facilities, the defendants were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead" (*Ibid*). As in 1920, the existence of this advantage was undisputed, and thus defendants were still able "by their

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to modify the decree, but stated in open court that they would consent to modification, provided it was made applicable to all defendants. . .

own admission to lay a handicap on rivals overweighted at the start" (*Id.* at 118). Similarly, the "second reason stated in the bill of complaint" remained, since defendants' "low overhead," resulting from the use of their existing distributive system for groceries, would still give them the "temptation" to engage in the practice of "fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated" (*Id.* at 116).

The Court also observed that despite the change of conditions then asserted by defendants, retailers were constrained to "look to the defendants for their meats" (*Id.* at 118). Accordingly, defendants were still in a position to exert "unfair pressure upon retailers and others with the design of forcing them to buy from the defendants and not from rival grocers" (*Ibid*).

Thus, the case came down to the defendants' inability to refute the continuing need for the decree as a protection against the dangers to competition which prompted its entry.

In disposing of defendants' alternative argument that modification was in order because of the hardship to which they were being subjected in reduced profits and increased costs due to their inability under the decree to employ their meat distributive system for the prohibited grocery products, the Court observed: "No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression" (*Id.* at 119). This observation with respect to hardship was made only after the Court had found the original reasons which prompted entry of the decree still to exist.

3. The Present Proceedings for Modification of the Consent Decree[3]

In November and December, 1956, Cudahy, Swift and Armour separately filed their current petitions for modification of the decree. During the many years that had elapsed since the *Swift* decision, the appellants had faithfully complied with all provisions of the decree. In contrast to the situation at the time of the 1930 proceedings, appellants had long since divested themselves of all facilities and interests proscribed by the decree.

In their current petitions, Swift, Armour and Cudahy request that they be relieved of the decree restrictions on their engaging in the manufacture, distribution and sale of the more than 140 categories of grocery and miscellaneous products listed in the decree (paragraphs Third and Fourth), operating retail meat markets (paragraph Sixth) and distributing and selling fresh milk and cream (paragraph Eighth).[4] Appellants seek no modification of the important provisions of the decree which bar them from engaging in any illegal restraints of trade or unfair trade practices (paragraphs First and Ninth), and which prohibit their ownership of stockyard facilities, railroads or newspapers, and public cold storage warehouses (paragraphs Second, Seventh and Tenth).

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[3] Citations will be abbreviated as follows:

1930 R.—Transcript of record filed in the Supreme Court in United States v. Swift & Co., 286 U.S. 106.

Tr.—Transcript in the present proceedings.

SX, AX, CX, GX, JX—Swift, Armour, Cudahy, Government and Joint Exhibits respectively in the present proceedings.

[4] No appeal has been taken from the denial of the requests of Cudahy for modification of certain other portions of the decree.

Although the evidence at the trial of appellants' current petitions dealt extensively with the changes which have occurred in the food industry since the entry of the decree in 1920 and the trial of the earlier modification proceedings in 1930, there was little factual dispute at the trial and the district court so stated:

> "The voluminous record and extensive arguments in these proceedings reveal few sharp disputes of fact. In general, the parties are agreed upon the statistical information presented, and upon the observable facts which describe the structure and patterns of the food industry today. The factual portion of the controversy is therefore concentrated upon the conflicting inferences which might be drawn from the admitted facts, the question of the characterization of prevailing market conditions, and the application of the standards, tests, and measures for the modification of an equity decree entered upon the consent of the parties. The conflict is concerned more with the significance of facts than with their existence" (Op., App. 31).

As the following summary statement of the evidence will show, in contrast to 1930, the dangers to competition in the grocery field against which the decree was directed no longer exist. The reasons alleged by the Government in 1920 and found by this Court in 1932 to form the basis for the decree have disappeared, as confirmed by the findings of the district court read in the light of the undisputed evidence as to present-day conditions.

a. **The Evidence of Changed Conditions in Grocery Retailing, Wholesaling and Manufacturing**

Prior to and during the 1920's, appellants' meat distribution systems, including branch houses, railroad route cars and other facilities provided them with a unique distributive system for their meat as well as their grocery

products, which enabled them to reach the tens of thousands of small independent retailers who then predominated. More importantly, appellants could employ their meat distribution systems not only for handling meat, for which they were designed, but also for handling and selling groceries at no substantial increase of overhead. The resulting low overhead afforded them the cost advantages which, the Government's complaint alleged, enabled them to engage in predatory price-cutting (Complaint, App. 78; *Swift* case, *supra*, 286 U.S. at 115).

In contrast to the situation prevailing in both 1920 and 1930, appellants' distributive facilities today, as the district court found, "would not afford any substantial advantage in the distribution of groceries along with meats" (Op., App. 55). The district court found that the "branch houses now in use for meats are not adaptable for the handling of the large quantities of grocery items required by modern retail outlets" (*Ibid.*). They are uneconomic for distributing even those limited types of grocery products not barred by the decree.[5] As a result, as found by the court, the "permitted grocery items sold by the defendants are being distributed to an increasing degree independently of meats, through separate units of the business" (Op., App. 55). The separation referred to by the court is thoroughgoing. Appellants have placed the manufacture, distribution and sale of their respective permitted grocery items under management unconnected with fresh meat operations, in separate departments utilizing sales forces and distributive techniques divorced from the fresh meat operations. As a result, appellants have either abandoned or are in the process of abandoning the branch houses as a means of

[5] The consent decree does not bar, and one or more of appellants manufacture and sell, a few unrefrigerated shelf items, such as salad and cooking oil, evaporated milk, canned dog food, peanut butter, soap and certain canned meat products.

distributing the non-prohibited grocery items (Tr. 572-75, 806-07; SX 3-5).

Moreover, appellants have found it impossible today to employ their general line meat salesmen, as formerly, for effectively selling even their limited line of non-prohibited groceries along with meat to the retail trade (Tr. 801-02, 1302-05, 3145-46). This is because today's retailer, predominantly chain-owned or affiliated with a wholesaler-sponsored retailing organization (voluntary) or with a wholesaling organization owned by a retailer group (cooperative), no longer purchases groceries from salesmen calling at the retail store door, but concentrates his purchases at the warehouse with which he is integrated (Tr. 618, 1780-83). As a result, 85% of the cooperative wholesalers and 82% of the voluntary wholesalers have dispensed with store-door salesmen (AX 27). Moreover, such wholesalers as well as corporate chains now prohibit store-door solicitation of their affiliated retailers by the salesmen of other wholesalers and food manufacturers, including appellants (Tr. 577-78, 802, 1353-60). Their retail members merely order upon preprinted forms which are then mailed back to the affiliated warehouse (Tr. 1613-14; AX 27).

Not only have changed conditions in the grocery industry removed appellants' former competitive advantages, they have created strong and efficient competition at every level of the industry. Thus, present-day retailing is carried on in large, efficient supermarkets, which in 1958 accounted for approximately 74% of all grocery store sales (Op., App. 54). The more than 7,000 supermarkets which were built between 1955 and 1958 averaged sales of over $1.25 million a year (SX 11).[6] Such large volume, together with self-

[6] This is in contrast with the situation in 1929, and 1920, when retail food stores were typically small, clerk-service operations, averaging only $23,800 annually (Tr. 1044; SX 7F, 12). Retailers

service, mass merchandising and scientifically engineered store layout, have strengthened the modern retail grocer by permitting him to increase efficiency and substantially lower costs (Tr. 1044-46, 1608-13; AX 25; CX 26; SX 11).

Paralleling the growth of the supermarkets, grocery wholesalers have vastly increased the scope and efficiency of their operations, which are now tailored to modern-day mass distribution of groceries. In 1929, independent wholesalers averaged sales of only $511,000 annually and were relatively inefficient (SX 18; Tr. 3141-42). By contrast, in 1958, cooperative wholesalers averaged sales of $13.3 million annually (SX 25). Other types of grocery wholesalers, voluntaries and unaffiliated, have also significantly increased sales volume, and unit operating costs have been reduced (SX 25; Tr. 6798-6800). This increase in volume and efficiency has been attended by the construction (mainly since World War II) of modern wholesaling facilities, which are specially adapted to the low-cost handling and large volume delivery required by today's supermarkets (Tr. 1123-24, 1169, 6798-6802; AX 4).

In addition, retailing is now closely integrated with wholesaling throughout the industry. As the district court found, "the strength of the chains," by which the court meant corporate chains, voluntaries and cooperatives, "has continued to increase" since 1930 (Op., App. 54). Quantitatively, corporate chain stores and voluntary and cooperative member-stores account for over 83% of retail grocery sales (AX 19). Furthermore, such retail outlets obtain sub-

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unaffiliated with any chain, voluntary or cooperative wholesale organization were the largest group in the food store market (SX 22). Even those stores which were affiliated with voluntary or cooperative organizations usually maintained a loose relationship with their wholesaler, purchasing only a small part of their food requirements from this source (Tr. 3095-96; 1930 R. 766; GX 210, p. 7).

stantially all of their requirements from affiliated wholesaling warehouses (Tr. 1142-43, 3187-88, 7143-45, 7447-48). Their integrated wholesalers provide retailers affiliated with voluntaries and cooperatives with not only group buying and warehousing services, but also extensive financial and management assistance (Tr. 1193-96, 6800; AX 28). And the small number of retail grocery stores which remain unaffiliated can obtain similar services from cash-and-carry wholesale outlets (Tr. 1599-1601; AX 28).

The foregoing changes have also had their impact at the level of grocery manufacture. With store-door selling outmoded, even the small grocery manufacturers can as easily serve the trade as appellants since they do not need an extensive sales force working at the retail level (Tr. 1442, 1627-28). Moreover, there are today many strong and efficient companies manufacturing or processing each of the now-prohibited grocery products (AX 105; CX 68; SX 90-93). These have plants and equipment already in existence and brand names with established consumer appeal (Tr. 1503-05, 3350; CX 69). Although appellants' trade names are well known in meats, they have not been successfully transferred to grocery products (Tr. 3112-14, 3533-35, 5842-44, 7988-89; JX C). Finally, government witnesses testified that appellants' entry into grocery manufacturing would in fact be beneficial to competitive conditions (Tr. 6820-21, 7340).

The absence of any prospective competitive advantage over rival grocery manufacturers or wholesalers is also demonstrated by the record of appellants' performance in those limited grocery items not barred by the decree. Appellants' respective shares of the market in the non-prohibited grocery products have suffered an almost consistent decline (AX 71-82; CX 53-60; SX 60, 69-77). The Government, moreover, stipulated that today there is active competition among and between the appellants and all others who

produce and sell these non-prohibited grocery products (JX B, C and D).

b. **The Evidence of Changed Conditions in Meat Packing**

In 1920, it was charged that appellants were attempting to extend an alleged monopoly in meat into groceries. While by 1930 competition in meat packing had been restored among appellants, retailers were still dependent on them for meat supplies, and the danger remained that if the decree were lifted, appellants would condition the sale of meats upon the purchase of their groceries (286 U.S. at 118; 1930 R. 744, 1049). This dependency stemmed largely from appellants' then strategic position as the only meat packers operating on a national scale. Only appellants, with their extensive branch house systems, fleets of route and refrigerated cars, large forces of general line salesmen soliciting at the store-door level and huge plants at the old livestock marketing terminals, were in a position on a national scale to service retailers with meat (1930 R. 441-42, 470; Tr. 3011-15, 3398-99).

In contrast to the situation prevailing throughout the 1920's, the district court in the pending proceeding did not find that purchasers of meat or meat products are today dependent upon any of appellants as a source of supply or that any danger remains that appellants could tie groceries to meat. The Government stipulated that today none of the appellants conditions the sale of its meats upon the purchase of the non-prohibited grocery products (JX B, C and D). The disappearance of any dependency on appellants has been caused by the rise of hundreds of meat packers and processors, attracted by far-reaching changes throughout the industry, who now compete with appellants in the national market, and are available as alternative

sources to retailers everywhere (Tr. 3099-3101, 4284-88, 4590-91).

The former necessity for packer branch-houses in each locality has been obviated "with the increased development of volume-buying direct from packing plants" and the construction of chain-operated meat warehouses (Op., App. 52; Tr. 4873-74). Mechanically refrigerated trucks now enable all packers to make such direct shipments quickly and effectively from coast to coast (Tr. 4590-91, 4924-27). National selling by packers of all sizes via long-distance telephone has supplanted large store-door sales staffs now that "centralized buying of meats has increased, with corporate chains purchasing practically all of their meat under group buying arrangements" (Op., App. 55), and with important cooperative and voluntary groups doing likewise (Tr. 3454-55, 3492-93; AX 108). "The quantity of meats sold under the private brands of chains, wholesalers, and retailers has increased," thus permitting them to buy from packers without established brands (Op., App. 52; Tr. 3104-05). Similarly, "the growth of federal meat grading programs since World War II has tended to widen the markets open to the small competing packers" since federal grades are increasingly displacing nationally-advertised packer brands, thus equalizing the competitive position of packers large and small, and enabling retailers to buy meats from distant packers without the need for local buyer inspection (Op., App. 52; Tr. 3040-42, 3058, 3100-01, 4582-83, 5789, 6903, 6907-08).

Extensive changes in meat slaughtering and processing techniques have allowed smaller competitors to do business with a lower capital investment. In contrast to the large multi-specie, multi-story and multi-function plants required in the 1920's (Tr. 4284-85, 4330-32), today's processing, and even the slaughtering of different species, is carried

on in separate, single-story, highly mechanized facilities which are now operated as successfully by smaller packers and processors as by the larger ones (Tr. 3867-68, 4300-03, 4330-34, 4338-40; AX 39, 40). Finally, decentralization in livestock marketing has enabled packers, regardless of their plant location, to obtain livestock readily and cheaply at neighboring markets in which there is governmental assurance of competitive conditions (Tr. 4590-92, 4641-43; AX 60, 66, 67).

Demonstrative of the increased number and importance of non-defendant sources for meat has been the appellants' steady decline in the meat packing industry since 1930. Appellants' total slaughtering operations, as reflected in their percentages of the total liveweight or dressed weight of U. S. Commercially Slaughtered meat, showed the following significant declines between 1930 and 1958: Armour, from 17.0% to 10.8%, more than one-third of its industry position; Cudahy, from 5.5% to 2.4%, more than one-half of its industry position; and Swift from 18.2% to 14.1%, more than one-fifth of its industry position (AX 54; CX 43; SX 46). Appellants' decline has been even greater in processed meats which is the most profitable part of the meat packing business (Tr. 3820-22; AX 43). "Under competitive pressure, the petitioners have processed a decreasing share of their slaughter, . . . relinquishing a more profitable aspect of the business" to competitors (Op., App. 53).

Appellants' decline in the industry is further demonstrated by the fact that their profits have been steadily "below the average of their smaller competitors" (Op., App. 53). During the ten-year period 1949 to 1958, Armour experienced an average annual loss of $596,000 in its meat operations (AX 33). In this same period, Cudahy's total operations resulted in a net loss of over $900,000 (CX 111).

Finally, Swift's total earnings as a percentage of net worth were almost consistently lower than those of non-defendant packers in the period since 1937, whereas prior thereto they had been almost consistently higher (SX 82, 83).

Appellants' decline in meat packing has been attended by the disappearance of competitive advantages which they formerly possessed with respect to rival packers and processors. Thus, "the advantages flowing from the location of the defendants' large packing plants at the nation's chief rail centers have diminished," with the result that major plants have been closed and appellants forced to withdraw from important markets (Op., App. 51; Tr. 4347-50; CX 4). "With the increased development of volume buying direct from packing plants, the branch houses were gradually reduced in number and efficiency" (Op., App. 52). The remainder handle an ever smaller amount of product, and that often at a loss (Tr. 4034-37; AX 48). Appellants have "drastically reduced their ownership of refrigerated railroad cars," and no appellant "owns a significant share of the available means of transportation today" (Op., App. 52). "The increase in the cold storage facilities of both retailers and wholesalers has made the defendants' provision of extensive refrigerated shipping and storage space unnecessary" (Op., App. 52).

c. The Evidence of Changed Conditions in the Handling of Fresh Milk

Finally, and with specific reference to paragraph Eighth of the decree, which prohibits appellants from handling or selling fresh milk and cream, a significant change in the law through the initiation and increased application of Federal Milk Marketing Orders, promulgated by the Secretary of Agriculture pursuant to the Marketing Agree-

ment Act of 1937, as amended (7 U.S.C., § 608 (c)),[7] has caused an unforeseen hardship to appellants' permitted dairy operations.[8] Since appellants are barred by the decree from selling fresh milk, they are unable to qualify as "handlers" under such Orders (Tr. 6193-94, 6201). Inability to qualify has placed appellants under serious competitive handicaps, since today they are either unable to retain their farmer suppliers in the ever-expanding areas covered by Milk Orders, or are forced to pay such high prices for raw milk that profitable operation of their cheese, butter and milk condensing or evaporating plants are rendered difficult or impossible (Tr. 6189-91, 6200-06, 6257-60). Deprived by paragraph Eighth of the requisite flexibility to adapt to changed conditions, appellants' sales of the specifically permitted dairy products have shown a significant decline, their manufacture of such products has been curtailed, and numerous of their dairy manufacturing plants have been closed (Tr. 6248-49, 6283-90).

THE QUESTIONS ARE SUBSTANTIAL

In denying modification of forty-year old consent decree restraints on otherwise lawful competitive activity, the district court departed from this Court's ruling in the *Swift* case and from basic principles of federal antitrust policy, in the following respects: (1) Modification has been denied although the dangers against which the decree was entered no longer exist and, in determining those dangers

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[7] Seventy-seven such orders were in effect in 1959, blanketing much of the country and directly affecting about 40% of the milk sold by farmers, and these are supplemented by a number of state programs further extending the application of milk price regulations (Tr. 6205; AX 86-89).

[8] The decree specifically permits petitioners to buy and use fresh milk and cream in manufacturing condensed, evaporated or powdered milk, oleomargarine, butter, ice cream, cheese, buttermilk, or in feed.

the complaint has been ignored. (2) Size, even when not attended by the power of anticompetitive abuse, has been treated as synonymous with danger to competition, and has been found to be a sufficient reason for continuing antitrust injunctive restraints. (3) By consenting to the decree, appellants have been held to have bargained away their right to obtain modification. (4) Great uncertainty has been created as to whether and what kind of hardship must be shown in an antitrust decree modification case. (5) The benefit to the public interest which would result from increased competition by appellants in the food industry has been treated as irrelevant. (6) Realistic standards for consent decree modification have not been followed. (7) The court has ignored the possibility of adapting the decree to changed conditions through partial relief.

These errors of the district court give rise to the substantial questions presented on this appeal. They go to the heart of the question of the proper standards for modification of antitrust consent decrees.

I. Antitrust consent decrees prohibiting otherwise proper business endeavor should be modified whenever the defendant has affirmatively established that changed circumstances make them presently unnecessary for protection against the dangers to competition which originally led to their entry. Injunctions under the antitrust laws can find their justification only in those laws. Entered to "prevent and restrain" those actions which offend the statutes, they must be removed when it is affirmatively shown that the original need for them is gone. The policy of the federal antitrust laws requires the removal of restraints on competition, whether privately or judicially imposed.

Where a consent decree has been entered without a trial, the complaint furnishes the proper basis for determining the reasons for the decree's entry. To ignore the complaint in consent decree cases is to leave the reason for the decree to mere conjecture. The allegations of the original complaint are clear in their statement of the reasons for the prohibitions in issue (*supra*, p. 6). The Government itself in the 1930 case reaffirmed that those allegations were the "principal ground" and primary basis for the injunction (Gov't S. Ct. Reply Brief, pp 1-2).[9] Similarly, the Supreme Court on appeal in the *Swift* case was guided entirely by the allegations of the complaint in determining the reasons for this decree. The inquiry below should properly have been directed to whether those same reasons obtain today.

In an unaccountable departure from customary procedure and from the opinion of this Court in the *Swift* case, the district court held that the complaint allegations are irrelevant, and that the previous opinion of this Court did not, despite its plain language, treat the complaint reasons as the controlling reasons. It asserted that these reasons do not really account for the decree provisions, and that it was "fortuitous" that the complaint stated any reasons at all (Op., App. 46). It proceeded instead to embark upon an unprecedented speculative analysis in its search for an "underlying reason." The district court fell into these

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[9] In its reply brief in the Supreme Court in the 1930 case, the Government contended:

> "The sole issue presented to this Court by the Government is whether appellees have shown changes since 1920 which warrant modifying the consent decree to permit the defendants (1) to manufacture and handle (except at retail) unrelated lines and (2) to use their distributive facilities in this connection.
>
> "As bearing upon this issue, it is of fundamental importance to observe that there has been no change in the condition set forth in the Government's bill as the principal

errors by failing to keep to the fore the policy of the antitrust laws. The sole basis for the prohibitions in issue was an antitrust purpose of removing certain dangers to free competition in the grocery industry allegedly existing in 1920. Those dangers were clearly identified. The district court overlooked them through its preoccupation with appellants' corporate size and the supposed compromise reached by the parties when the decree was entered.

2. The district court held that the decree cannot be modified as long as the appellants retain large size as meat packers (Op., App. 49, 57). This test is completely contrary to this Court's holding in the *Swift* case, and to fundamental antitrust principles laid down in other decisions of the Supreme Court.

The district court quoted an excerpt from the *Swift* opinion to attempt to support its thesis (Op., App. 48-49). But the *Swift* opinion clearly adopted as the test, not size, but the question of whether changes had removed the danger of the competitive abuses of power against which the decree was entered. "The inquiry," the Supreme Court said, was "whether the changes are so important that dangers, once substantial, have become attenuated to a shadow" (286 U.S. at 119). The opinion stated plainly what these critical dangers were.

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ground for enjoining the defendants from dealing in unrelated lines. The Government's request for such an injunction rested primarily upon the allegation that the defendants could handle unrelated lines through their nation-wide distributive system with comparatively no additional overhead expense and could employ this advantage 'temporarily to fix prices so low as to gradually eliminate competition,' with consequent danger of monopoly and restraint of trade (R. 17). There has been no material change in the extent or character of defendants' nation-wide distributive system. And appellees admit, indeed assert, that they can today use this system to handle unrelated lines with practically no additional expense' (Gov't S. Ct. Reply Brief, pp. 1-2).

The Court said:

> "Two reasons, and only two, for exacting the surrender of this adjunct of the business were stated in the bill of complaint. Whatever persuasiveness the reasons then had, is theirs with undiminished force today" (*Id.* at 115).

The Court held that the "first reason" was:

> ". . . that through the ownership of refrigerator cars and branch houses as well as other facilities, the defendants were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead. There is no doubt that they are equally in that position now" (*Ibid.*).

And the "second reason" was:

> ". . . the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated" (*Id.* at 116).

The Court stated that the defendants would still have the "temptation" to resume predatory price cutting because their low overhead costs, resulting from the ability to distribute groceries in the same facilities used to handle their nation-wide meat sales, would still put them in a position to starve out competition.

It was only in light of the continuing applicability of these reasons that the Court referred to the defendants' size. It specifically held that size was not itself the offense. It pointed out, however, that "size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past" (*Id.* at 116). The continued presence of the decisive distribution cost advantage which had been "utilized in the past"

required the Court to hold that the original competitive dangers were still present.[10] This prevented modification despite the changes asserted by defendants. Thus, the termination of defendants' monopoly in meat and the restoration of competition did not afford adequate grounds for modification since the original dangers were found to be still present:

> "Changes there have been that reduce the likelihood of a monopoly in the business of the sale of meats, but none that bear significantly upon the old-time abuses in the sale of other foods" (*Id.* at 117).
>
> • • •
>
> "When they [defendants] add groceries to meats, they will do so, they assure us, with substantially no increase of the existing overhead. Thus in the race of competition they will be able by their own admission to lay a handicap on rivals overweighted at the start" (*Id.* at 118).

The Court also rejected the contention of the defendants that the growth of the chains since 1920 had removed the dangers to competition created by the distribution advantage. It found instead that the chains and other retailers depended upon the defendants for their meats. This would accentuate the competitive danger in the distribution advantage against which the decree had been entered. The Court observed that:

> "If the grocery business is added to the meat business, there may be many instances of unfair pressure upon

[10] Although the retailing prohibitions of the decree were not before the court on appeal, the court stated that this rationale permeated the prohibition against retailing as well as that against manufacturing and wholesaling. "The one prohibition equally with the other was directed against abuse of power by the individual units after the monopoly was over; . . ." (286 U.S. at 117).

retailers and others with the design of forcing them to buy from the defendants and not from rival grocers" (*Id.* at 118).

Under these conditions, the old dangers of abuse, to the Court, were not "attenuated to a shadow." The continuance of these dangers, and not defendants' size, was the reason for denying modification.

The district court's emphasis on size in the present case was not only contrary to the standards established by the *Swift* opinion, but to basic antitrust principles consistently adhered to by this Court over the years. The Court has repeatedly rejected contentions that size alone is a danger against which Sherman Act policy is aimed. This line of decisions is unbroken from *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920), through *United States v. International Harvester Co.*, 274 U.S. 693, 708 (1927), the *Swift* case itself, 286 U.S. at 116 (1932), and *United States v. Columbia Steel Co.*, 334 U.S. 495, 526 (1948); only recently, in *Tampa Electric Co. v. Nashville Coal Co.*, —— U.S. ——, 81 S. Ct. 623 (1961), this Court rejected the use of large dollar-volume figures as the measure of danger to competition.

The district court's errors led it to overlook the significance of the evidence of massive economic changes in the food industry since 1930, and the disappearance of the dangers of the old abuses. Unlike this Court in the *Swift* case, it held against the appellants even though it found the distribution cost advantage gone; it identified no continued dangers or temptations of predatory price cutting or of unfair pressure on retailers; and it reached no conclusion that a "war of extermination" was threatened or even possible.

Instead the district court treated appellants' size as synonymous with the danger of competitive abuse, and sub-

stituted their size for the competitive dangers which had prompted the decree. The inferences drawn by the court adverse to appellants stemmed entirely from the erroneous presumption that size was the evil. Mere statistical data on appellants' size in the meat industry, as measured by their assets, total sales and livestock slaughter was treated as "dominance in meat packing" (Op., App. 50-53), despite the extensive and detailed evidence demonstrating that appellants' size does not afford them any power to overwhelm competitors today, and more particularly, does not give them any power to tie groceries to meats, and despite the fact that the court made no finding that any appellant has such power. The error was compounded by aggregating statistical measurements of appellants as if they were still in combination with each other (Op., App. 51 and 53), in the face of the court's own finding that the combination had ended long ago (Op., App. 56). For example, through aggregation, the court seemed to regard Cudahy's 2.4% of total U.S. slaughter as amounting to "dominance in meat packing" (*supra*, p. 18; Op., App. 50-53).

In addition, certain ambiguously described competitive advantages in wholesaling which the court thought defendants might enjoy (Op., App. 55), were simply assumed as inherent in size and diversification, despite the court's own findings based on undisputed evidence that groceries and meats are generally bought and sold separately today, that appellants' permitted grocery items and meats are completely separated in appellants' distribution systems, and that, in contrast with 1920 and 1930, appellants' meat distribution systems are totally unsuitable for the handling of groceries in competition with modern wholesaler organizations (Op., App. 55; *supra*, p. 12). Similarly, the court indicated that an undefined advantage would accrue to appellants in retailing because of their aggregate size as meat packers (Op., App. 54), despite the court's findings

that appellants are in active competition with each other, that they have lost many of their former advantages in meat packing, that extensive changes have occurred in meat distribution since World War II which have worked to "widen the markets open to the small competing packers" (Op., App. 52), and despite the absence of any finding that retailers are dependent upon appellants for meat.

3. The district court erred by concluding that appellants are not entitled to relief because they bargained away their right to modification so long as they retain their size as meat packers. While purporting to disclaim a holding that appellants are barred from relief by contract (Op., App. 37), the court repeatedly emphasized the fact of compromise and settlement (Op., App. 11-12, 41, 42, 44, 45, 49, 57). "[T]he decree was the product, in principal part, of negotiation between the defendants and the government" (Op., App. 11); it "bears traces of compromise" (Op., App. 42); and the "evidence of compromise in the decree suggests their [defendants'] power to bargain" (Op., App. 44). From this the court argued: "They gained significant advantages through their consent. They . . . avoided the risk of more drastic relief that might have required division of their gigantic operations" (Op., App. 44). This led the district court to deny relief because: "They chose to retain size as meat packers rather than to risk further dismemberment, at the price of abandoning the opportunity to extend into other fields" (Op., App. 57).

Appellants challenge the use of the supposed bargain as a guide to modification. It led the court to err by adopting different, and more stringent, tests for modification of this consent decree than would be applied to litigated decrees. According to the court below, the difference between litigated and consent decrees has a "profound effect

. . . upon the task of the judge in ruling upon a request for modification" (Op., App. 41); for a consent decree, "the way of escape is narrow" (Op., App. 43).

This treatment of consent decree modification runs counter to the express statements by this Court in the *Swift* opinion that: "The result is all one whether the decree has been entered after litigation or by consent . . . [I]n truth what was then adjudged was not a contract as to any one" (286 U.S. at 114-15). The opinion below is equally at odds with the recent holding of this Court in *System Fed'n 91, Railway Employes' Dep't v. Wright*, 364 U.S. 642 (1961). Quoting with approval the above language from *Swift*, this Court emphasized that:

> "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction.
>
> • • •
>
> "The type of decree the parties bargained for is the same as the only type of decree a court can properly grant—one with all those strengths and infirmities of any litigated decree which arise out of the fact that the court will not continue to exercise its powers thereunder when a change in law or facts has made inequitable what was once equitable. The parties could not become the conscience of the equity court and decide for it once and for all what was equitable and what was not, because the Court was not acting to enforce a promise but to enforce a statute" (364 U.S. at 651, 652-53).

In holding that the meat packer consent decree cannot be modified because appellants still retain the corporate size which they allegedly kept in exchange for relinquishing other freedoms, the district court followed a bargain theory which this Court has just held to be erroneous.

4. The appeal raises the question of the proper relation of a showing of hardship to antitrust consent decree modification. The appellants at the trial produced proof of financial and competitive hardships, including the stultification of their research on new food products and processes, to which they are subjected by the continuation of the decree. Appellants contended that absent any present need for the decree, continuance of its sweeping prohibitions against competitive activity by them in major segments of the food industry works a hardship on them which should properly form additional grounds for modification of this decree. At the same time, however, they maintained that a showing of hardship is not a prerequisite to modification where the need for the restraints is gone. The Government, on the other hand, contended that the appellants in a consent decree modification case must always show grievous, unforeseen hardship.

While the district court rejected the Government's hardship argument as too extreme, it also apparently disagreed with the appellants' interpretation. Without support from this Court's previous *Swift* opinion, the district court called lack of need and hardship "correlative elements of a single standard. . . ." (Op., App. 40).

The district court held that appellants had not shown enough hardship to warrant modification (Op., App. 55-56), but it is impossible to know from the opinion what effect, if any, this holding had upon the decision against modification, since the court had made conflicting statements as to the necessity of hardship.[11]

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[11] The court stated once that defendants must show that the decree can no longer be justified because of changed conditions, "*and* that they are suffering injury, without counterbalancing advantage to the public interest, sufficient to move a court of equity to act" (Op., App. 43; emphasis added). Later, it contradicted itself by saying that the "defendants' mistake in

Such an important legal question should not continue to be enshrouded in this much doubt. Appellants urge that the Supreme Court did not intend in the *Swift* opinion to require a showing of hardship as an absolute prerequisite to modification of an antitrust consent decree where the original need for it has vanished. Such a requirement for antitrust consent decree modification would be unwarranted both by the principles of antitrust policy, whose sole purpose is to maintain competition, and by the fundamentals of equity, whose function is remedial, and not punitive.

5. This appeal raises substantial questions concerning the future of competition in major branches of the food industry. The appellants seek freedom to add their competition to the phases of the food industry now prohibited to them. But the district court treated the question of the public value of increased competition by appellants as of no significance. The court said that the elimination of the appellants from the general food industry "can hardly be said to harm the public interest" (Op., App. 56). But it added on the other hand, "to whatever extent the defendants would be a significant competitive power in the field, the fears which gave birth to the decree are confirmed" (*Ibid.*). These assertions, that new competition should be treated as either unimportant or inherently dangerous, manifest little faith in the philosophy that "the policy unequivocally laid down by the [Sherman] Act is competition" *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

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giving consent will remain beyond recall until the decree operates to oppress him in ways uncontemplated at its issuance, *or* until circumstances have so changed that the foundations of the decree, whether adequate or not, are completely undermined" (Op., App. 43; emphasis added).

6. The landmark opinion in the *Swift* case was the last occasion on which this Court has broadly analyzed the legal and economic standards governing modification of antitrust consent decrees. The great majority of the decrees now in force have been entered in the years since then, and the consent decree has become a prime instrument of antitrust enforcement. Far more civil antitrust cases brought by the United States are terminated by entry of such decrees than in any other way. Since the first antitrust consent decree in 1906, almost 500 have been entered, governing numerous different industries and types of competitive activity (2 Trade Reg. Rep. ¶ 8421). The number is steadily increasing. It is obviously of great importance that there be clear standards governing modification of this large number of continuing antitrust injunctions. It is of even greater significance to the free competitive policy of the antitrust laws that the standards governing decree modification be such as to permit removal of prohibitions which have plainly outlived their antitrust usefulness. It is especially important that prohibitions of the kind found in the present decree against engaging in otherwise entirely lawful fields of activity be subject to removal. It is not contended that such restrictions should be lifted without a convincing showing. But when such a showing is made, the restraints on competition should be removed. Otherwise, the continually growing accumulation of such outmoded decrees will defeat the very policy of economic freedom which brought them into being.

7. While recognizing its power to modify as an abstract equitable proposition, the district court drained the power of substance by erecting enormous obstacles to modification which are likely to add further support to an already growing view that modification of antitrust consent decrees

in contested cases has ceased to be a realistic possibility.[12] This is particularly true here since the court even ignored the appropriateness of any form of partial relief. Its sweeping and doctrinaire holding as to the purpose of this decree led it to shut its eyes to all possibilities for adaptation of the decree to modern needs. For example, if the court objected to retailing by the appellants because it feared that they might acquire existing retail stores or chains (Op., App. 54), despite the protection against anti-competitive acquisitions afforded by Section 7 of the Clayton Act, it had but to grant relief qualified by a provision restricting acquisitions. If the court was concerned that the appellants would have undue advantages in competing with grocery wholesalers by selling a full line of meats and groceries (Op., App. 55), despite its findings contrary to any such advantages, it should at least have considered allowing manufacturing by the appellants, with some provision for marketing grocery products through the wholesale outlets of others.

The court seemed to think that even the slightest modification was legally precluded. It thereby completely ignored the flexible powers of equity, and the almost infinite variety of measures available to a chancellor in fashioning appropriate relief. These powers, it is urged, should have been exercised to lift unnecessary shackles on lawful enterprise in order to carry out the policy of the antitrust laws. Instead, the opinion below has assigned a virtually immutable status to this decree, which is inconsistent with the requirements of antitrust policy and which conflicts with the decree modification principles previously

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[12] Kramer, *Modification of Consent Decrees: A Proposal to the Antitrust Division*, 56 Mich. L. Rev. 1051, 1063-64 (1958); Dabney, *Antitrust Consent Decrees: How Protective an Umbrella?* 68 Yale L.J. 1391, 1393-97 (1959).

expounded by this Court. The opinion gives rise to the inquiry: Short of dissolution, what possible showing could appellants make which would entitle them to relief?

CONCLUSION

The questions presented by this appeal are substantial and they are of public importance. The case itself is of great significance in the field of antitrust law. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

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April 1961

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JAMES R.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 875

SWIFT & COMPANY, ARMOUR AND COMPANY, and THE CUDAHY PACKING COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Northern District of Illinois

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April 1961

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Opinion and Judgment of the District Court

IN THE

UNITED STATES DISTRICT COURT

For The Northern District Of Illinois

Eastern Division

UNITED STATES OF AMERICA, *Plaintiff*, vs. SWIFT & COMPANY, ARMOUR AND COMPANY, THE CUDAHY PACKING COMPANY, et al., *Defendant*.	Civil Action No. 58 C 613

December 12, 1960

JULIUS J. HOFFMAN, *District Judge*.

The petitioners, defendants in this historic litigation, have sought modification of the antitrust decree entered with their consent forty years ago. The government has vigorously opposed the petitions.

Following extensive discovery proceedings and the disposition of preliminary motions, the parties were afforded the plenary hearing required upon such a petition. *Hughes v. United States*, 342 U.S. 353 (1942). Oral testimony occupied some three and one-half months, producing a transcript in excess of eight thousand pages. Nearly one thousand exhibits have been received, containing an even greater volume of pages. As the record indicates, the court had grave doubt of the admissibility of portions of the petitioners' evidence, both oral and documentary.

Much of it was remote and of tenuous relevancy, or entailed matters of general opinion. It was the position of the court, however, throughout the lengthy hearings that the equitable nature of the proceeding warranted giving the petitioners every opportunity to support their request.

The court has been aided by detailed and exhaustive briefs, running to another thousand pages, and by full oral presentation of the parties' positions. The court also has before it the complete record of the prior proceedings in the case. The quality of representation on all sides has been exceptional.

THE ORIGINAL DECREE.

The antitrust history of the defendants goes back to the turn of the century. In 1902 the government filed a civil suit against the defendants which eventuated in a general injunction. *Swift and Company* v. *United States*, 196 U.S. 375 (1905). Subsequent criminal prosecutions failed. In 1917, at the direction of President Wilson, the Federal Trade Commission commenced a broad investigation of the meat packing industry. The report of this investigation, submitted in 1919, led to the commencement of the litigation in which this proceeding constitutes the latest chapter.

The Parties.

The suit was begun on February 27, 1920, in what was then called the Supreme Court of the District of Columbia. The principal defendants were the so-called Big Five of the meat packing industry: Swift & Company, Armour and Company, The Cudahy Packing Company, Wilson & Co., Inc., and Morris & Company. Eighty other corporations, comprising those subsidiaries of the principal defendants which were engaged in slaughtering, packing, or selling

meats, were also joined as defendants. Fifty of the officers, directors, and stockholders of the corporate defendants were named and joined individually as defendants. Of these one hundred and thirty-five original defendants, only six are now before the court as petitioners. One of the five principal defendants, Morris & Company, was absorbed by Armour and Company in 1923. Another, Wilson & Co., Inc., has not petitioned for modification or entered its appearance in this proceeding. The remaining three principal defendants, appearing here as petitioners, will be called Swift, Armour, and Cudahy. All of their subsidiaries which were joined as parties originally have since been dissolved with the exception of two Swift subsidiaries, Swift and Company, Inc., and Derby Foods, Inc., which will be included in the designation Swift. The sole survivor of the officers, directors, and stockholders of these corporate defendants who had been joined individually as parties who has petitioned here is E. A. Cudahy, Jr. The petitioners are, therefore, Swift, including its two subsidiaries, Armour, Cudahy, and E. A. Cudahy, Jr.

The Complaint.

The equity bill which commenced this suit consists of some thirty pages. The stated object of the action was to put an end to monopolies achieved by the defendants affecting the food supply of the nation, and to prevent the extension of this domination into other fields.

The defendants' principal business, it was alleged, consisted of the purchase and slaughter of livestock, namely, cattle, hogs, sheep, and calves, the dressing of the carcasses, and the distribution and sale of the dressed meats. Domination of the purchase of livestock, it was charged, had been achieved, pursuant to a common purpose, plan, and design, by various means. First, the com-

plaint recited, the defendants had acquired controlling interests in some twenty-two of the nation's stockyards, the public markets where livestock were bought and sold. Through the fees, charges, and services of the yards, they thereby gained power over the throat of the commerce involved. Through their interests in these yards, the defendants were also able to determine the number and location of packing plants in the desirable locations at and adjacent to the stockyards. Terminal railways, connecting the long-haul roads with the stockyards and the packing plants, had also fallen under the domination of the defendants according to the bill, giving them power to discriminate against other packers and independent buyers. Dominion over the other facilities required by traders and dealers at the yards was also achieved. Included was the allocation of office space, pens, and sites for stockyard banks, cattle loan companies, and rendering plants for the disposal of stock killed by accident or disease in the yards. According to the allegations of the government's complaint, the defendants had also gained control of the trade newspapers and market journals which cattle raisers must rely upon for accurate and unbiased reporting of demand. As as consequence, the defendants were furnished with a means of increasing or decreasing the flow of livestock to the yards in their own interests.

By wielding these powers, it was charged, the defendants had gradually forced out their competitors as dominating factors in the marketing of livestock. To eliminate competition among themselves, the government claimed, the defendants had entered into percentage purchased arrangements, apportioning the livestock offered at the several stockyards to the respective defendants in predetermined shares.

Concerning the marketing side of the defendants' businesses, the complaint alleged that the packers had developed a nationwide system for distributing and selling meats. A principal instrumentality in the system was called the branch house, a storage station with facilities for cooling and preserving fresh meats, from which sales were made to butchers, hotels, restaurants and other large consumers. The defendants maintained 1120 of these branch houses in various large towns and cities throughout the United States, according to the bill, while competing interest slaughterers maintained only 139.

To supplement the branch houses, and to serve the smaller communities, the defendants employed refrigerated railroad cars traveling over specified routes and filling orders for smaller quantities. The route cars operated by the defendants, it was alleged, constituted 90% of the total number operated in the packing industry. As an adjunct, the defendants, and particularly Armour, employed motor trucks to serve purchasers not conveniently reached by rail, in a total of 20,836 towns throughout the United States. As a part of their distribution system, it was stated, the defendant packers owned for their private use a number of cold storage warehouses where fresh meat products might be stored, and had acquired control as well of public cold storage warehouses engaged in the general business of leasing space for products requiring refrigeration.

Having eliminated competition in meats, the defendants, according to the government, set out to control the substitute foods to which the consuming public might turn from high-priced meats. To accomplish this purpose, the defendants had begun to deal, directly and through subsidiaries, in fish, vegetables, fruits, cereals, milk, poultry, butter, eggs, cheese, and other so-called substi-

tute foods as well as in meats. In addition, they acquired a large number of concerns manufacturing or selling these substitute foods, availing themselves of the financial resources amassed through their dominance in meats. Further control over other foods was achieved, it was alleged, through contracts for the defendants' purchase of the entire or exclusive output of many companies engaged in the production of these foods. In marketing these non-meat foods, the defendants availed themselves of their distribution systems and facilities designed principally for the handling of meats "with comparatively no increase of overhead." This advantage enabled the defendants to reach remote spots, it was alleged, and was employed temporarily to fix prices so low as to eliminate competition.

As the result of these activities, the complainant averred, the defendants had enjoyed an extraordinary rate of growth and had achieved immense size. In the fifteen years from 1904 to 1919, the combined net worth of Swift, Armour, Cudahy and Wilson had increased fivefold to nearly half a billion dollars. The net profits of the five principal defendants for the year 1917 nearly equalled their total net worth in 1904. Their combined sales amounted to three billion two hundred million dollars for 1918. The principal corporate defendants and the individual defendants and their families held controlling interests in 574 corporations and concerns, and lesser or indefinite interests in another 188.

In its concluding paragraphs, the government's bill of complaint prayed generally for an injunction prohibiting the defendants from entering into or carrying out any contract or combination in restraint of trade, from monopolizing or attempting to monopolize commerce in livestock or foods, and from engaging in unlawful practices or unfair competition to restrain or monopolize trade or

commerce. Specifically, the complaint requested a decree requiring the defendants to divest themselves of the instrumentalities of monopoly in meats, including retail meat markets, stockyards, terminal railways, market or trade journals, and public cold storage warehouses. In the field of substitute foods, so-called, the government demanded that the defendants divest themselves of all interests in concerns dealing in such foods, and discontinue direct dealings. To assure this divestiture, the government asked that the decree enjoin the defendants from re-acquiring any interests so divested, from obtaining any new interest in any concern dealing in prohibited substitute foods, and from engaging themselves in any dealings in these foods. To complete the divorcement of meats from substitute foods, the bill demanded that the defendants be enjoined from permitting their railroad cars, motor trucks, branch houses, or other distributive facilities to be used by anyone in the handling of prohibited commodities.

The Decree.

On the same day that the government filed its complaint with the court, a separate answer was filed on behalf of each of the five principal defendants and its corporate subsidiaries and affiliated individual defendants. These answers responded in extensive and minute detail to all the averments of the government's bill, and denied each material allegation.

At the same time, the parties presented to the court a stipulation, agreeing to the entry of an attached decree of injunction. On behalf of the defendants, the stipulation stated that while maintaining the truth of their answers and their innocence of any violation, they desired "to avoid every appearance of placing themselves in a position of antagonism to the Government" and therefore consented, with the proviso that their consent should not

be regarded as an admission, nor the decree as an adjudication, that they had in fact violated any law of the United States.

The stipulated decree was entered that day. Its recital of the parties' consent was followed by eighteen operative paragraphs. Summarized in numerical order, these paragraphs decreed as follows:

First. The corporate defendants were enjoined, jointly and severally, from contracting, combining, or conspiring to restrain, and from monopolizing, or attempting or conspiring to monopolize, trade or commerce;

Second. The defendants, jointly and severally, were restrained from owning any interest in any stockyard, terminal railroad, or market newspaper or journal;

Third. The corporate defendants were enjoined from using or permitting others to use their distributive system and facilities, including branch houses, railroad cars, and motor trucks, for handling or dealing in the non-meat foods specified in paragraph Fourth; the defendants were permitted to dispose of surplus or obsolete facilities free of the restrictions of the decree, subject to a requirement of court approval for sale of any substantial part of the system;

Fourth. The corporate defendants, jointly and severally, were enjoined from engaging in the business of handling, and from owning any interest in a concern engaged in handling, fourteen specified classes of foods and miscellaneous items, illustrated by a listing of 145 named commodities; the enumerated classes were (1) fish, (2) vegetables, except in combination with meats, (3) fruits, (4) confectionery and soda fountain supplies, (5) molasses, jellies, and similar sweets, (6) spices, sauces, and condi-

ments, (7) coffee, tea, chocolate and cocoa, (8) nuts, excluding peanuts, (9) flour, sugar, and rice, (10) bread, wafers, crackers, and biscuits, (11) cereals, (12) grain, (13) miscellaneous articles, including specified building materials, food-handling equipment and supplies, and cigars, china, and furniture, and (14) grape juice;

Fifth. The individual defendants were enjoined from holding a controlling interest in any concern handling or dealing in the commodities listed in paragraph Fourth;

Sixth. The defendants were restrained from owning or conducting any retail meat markets, other than for the accommodation of employees at their plants;

Seventh. The defendants were enjoined from owning any interest in public cold storage warehouses except in connection with their packing plants or as necessary in handling meats and other permitted commodities;

Eighth. The corporate defendants were enjoined from handling or dealing in fresh milk or cream, and from owning any interest in any concern so engaged, except as necessary to their dealing in condensed, evaporated, or powdered milk, butter, oleomargarine, ice cream, cheese, or buttermilk, or in combination with meats or other permitted items;

Ninth. The corporate defendants were enjoined from engaging in illegal trade practices;

Tenth. The defendants were directed to submit to the court, within 90 days, a plan for divesting themselves of ownership in stockyards, terminal railroads, and market newspapers and journals, and to dispose of these interests within the time and upon terms fixed by the court;

Eleventh. The defendants were directed, within nine months and with court approval, to divest themselves and

dispose of their interests in retail meat markets and public cold storage warehouses;

Twelfth. The defendants were directed, within two years and with court approval, to divest themselves of all interest in concerns engaged in handling the prohibited items enumerated in paragraph Fourth, to divorce or discontinue any branches or departments so engaged, and to dispose of all such commodities in stock or on hand;

Thirteenth. In the disposition of their interests in any stockyard at which they maintained packing plants, the defendants and their purchasers were required to agree to continue the operation of the stockyard and the packing plants, respectively, for a period of ten years;

Fourteenth. Nothing in the decree should be construed to prohibit the defendants from doing anything, otherwise lawful, in the United States in connection with their export trade or foreign commerce;

Fifteenth. Nothing in the decree should be construed to preclude the government from proceeding, civilly or criminally, against the defendants for any violation of law in the buying or selling of poultry, butter, eggs, or cheese, or any other business or activity not mentioned in the decree;

Sixteenth. The defendants were directed to supply information upon the request of the Attorney General and to permit inspection of their books and records, for the purpose of assuring compliance with the decree;

Seventeenth. All the defendants' sales or dispositions of properties or businesses which had been made within the five months preceding the entry of the decree and which otherwise would have been required by the decree were to be submitted to the court for determination of whether

they were in accordance with the spirit and purpose of the decree;

Eighteenth. The court retained jurisdiction to take any further action that might be necessary to carry out the decree and to entertain any applications by the parties with respect to it.

It is apparent that the decree was the product, in principal part, of negotiation between the defendants and the government. Within a single day the government filed its complaint, the defendants appeared and filed lengthy answers, the parties presented their stipulation and consent to a detailed and complex decree, and the decree was entered. The circumstances precluded extensive judicial consideration or analysis. No evidence was offered, no findings of fact were made, and no opinion was prepared to explain the decree.

In large part, the decree was responsive to the government's complaint. As demanded in its prayer, the defendants were required to divest themselves of their interests in stockyards, terminal railways, market newspapers and journals, public cold storage warehouses, and retail meat markets. They were also required to divest themselves of the business of handling certain of the items described by the complaint as substitute foods, although in this respect the decree does not extend to the full limits of the complaint. The government had charged the defendants specifically with seeking to control fish, vegetables, fruits, cereals, milk, poultry, butter, eggs, and cheese; the decree as entered reached only the first five of these commodities, and left the defendants free to engage in the business of handling poultry, butter, eggs, and cheese, along with a miscellany of non-meat foods not prohibited by the decree and a wide range of non-food commodities. The core of

the defendants' business activities remained untouched. They were left free to engage in meat packing, including slaughter, dressing and processing, and distributing at wholesale, without hindrance. In this field, their corporate empires were not dismembered, and they retained their huge size. The decree confined their power, however, and prevented its exercise or extension in the meat industry either backward in the direction of livestock marketing, or forward in the direction of retail marketing. What is known as vertical integration was foreclosed thereby to a significant degree. Although short of monopolization the defendants were free to expand their operations horizontally, as meat packers, they were excluded, for all practical purposes, from participating generally in the food industry. Their economic power was thus not destroyed but rather hemmed in.

SUBSEQUENT PROCEEDINGS.

With the entry of the consent decree, this litigation entered its second phase. In 1921, the National Wholesale Grocers Association and the American Wholesale Grocers Association were permitted to intervene in the proceedings for the limited purpose of receiving notice and being heard in opposition to any proposed change in the decree that would deprive them of its protections. On April 19, 1922, the California Cooperative Canneries filed an intervening petition, seeking to invalidate the consent decree in its entirety. It appeared that this intervenor had agreed with Armour to supply Armour's total requirements of California canned fruits for a ten-year period, and had committed the principal part of its output to this contract. The petition claimed the consent decree was void on several grounds. The defendants' refusal to admit any violation of law, it was argued, deprived the court of power to enter the decree. Since the complaint did not charge

that it was illegal for the defendants to engage in the grocery business, that portion of the decree, at least, could not be supported, it was claimed. The intervenor contended, too, that the decree was so general as to be a nullity, and that it was superseded by the Packers and Stockyards Act of August 15, 1921, 42 Stat. 159, 163. The motion for leave to intervene was denied in the trial court, but the Court of Appeals for the District of Columbia reversed the denial in September, 1924. (*California Cooperative Canneries* v. *United States*, 299 Fed. 908 (D.C. Cir. 1924)).

In November, 1924, motions were presented on behalf of Swift and Armour, their subsidiaries and officers, to invalidate the consent decree on similar grounds, and more particularly, because no case or controversy was before the court, because no facts were found to support the court's jurisdiction, because the decree violated the anti-trust laws by forbidding lawful competition, and because the Attorney General was without power to consent to the decree on behalf of the United States.

These motions were argued together. The trial court denied the motion to vacate the decree presented on behalf of Swift and Armour, but by order of May 1, 1925, suspended the operation of the decree, in pursuance of the Court of Appeals' mandate, until the intervening petition of California Cooperative Canneries could be fully heard on the merits.

Upon appeal from the denial of the Swift and Armour motions, the United States Supreme Court affirmed, upholding the validity of the decree. *Swift & Company* v. *United States*, 276 U.S. 311 (1928). The suspension, however, remained in force until set aside a year later by the Supreme Court in *United States* v. *California Cooperative Canneries*, 279 U.S. 553 (1929). Upon receipt of the man-

date of the United States Supreme Court, the trial court on July 24, 1929, revoked the suspension of the decree. On the same day, however, Swift and Armour filed motions to extend the time for compliance with the decree, and the court granted a temporary extension for all defendants until the motions could be fully heard. Before these motions came on for hearing, however, and on August 10, 1929, they were superseded by petitions on behalf of Swift and Armour to modify the decree and to vacate its principal prohibitions.

The petitions for modification, as amended on April 2, 1930, accepted the consent decree as valid and lawful when entered. This request for relief from its prohibitions was based therefore not upon any asserted defect in the original proceedings, but rather upon the claim that the decree had become, in the ten years since its entry, unnecessary and unjust in view of "radical and revolutionary changes" in economic conditions. These changes, it was claimed, were both unexpected and unforeseen, and worked a revolution in food distribution methods.

Because the petitions now before the court proceed upon the same underlying theory, the 1930 petitions warrant full examination for comparative purposes.

Although these petitions of Swift and Armour vary in their detail, both are based upon two major propositions: First, that the defendants no longer occupied the monopolistic position in the meat packing industry which they held at the time the decree was entered in 1920; and Second, that economic changes since 1920 had eliminated any danger that the defendants might employ any dominance in the meat industry as a weapon to achieve control in the marketing of non-meat foods and other commodities. It followed, they argued, that the decree without reason or need restrained lawful competition by prohibiting the

defendants from making efficient use of their facilities and experience and from diversifying their businesses as their rivals were free to do, to the injury of the general public as well as the defendants.

In support of the first branch of their argument, the petitions alleged that any combination among the defendants had been dissolved, that they were parties to no agreements in restraint of trade, and that they were engaged in active and open competition with each other. The defendants themselves had undergone changes since the decree. The Armour stock, formerly held by the Armour family, had been dispersed and was publicly held. Armour had been refinanced, and Wilson & Co., Inc., had gone through receivership and bankruptcy proceedings as well as refinancing. Morris & Company had sold its assets to Armour and had gone out of business. Several subsidiary corporations had been dissolved, and a number of the individual defendants had either died or severed their connections with the defendants since the entry of the decree. All of the defendants, it was claimed, had suffered losses and declining sales volume in the decade of the twenties.

Several legal developments were also relied upon in support of the requested modification. The government's legal theory, embodied in the decree, was said to be that size alone constituted an offense under the Sherman Act, and this theory, the defendants argued, had been rejected in *United States* v. *United States Steel Corp.*, 251 U.S. 417, 450-51 (1920), after the entry of the decree by the Supreme Court. By the enactment of the Packers and Stockyards Act of August 15, 1921, 42 Stat. 159, 163, Congress had conferred regulatory control over the packing industry and public stockyards upon the Secretary of Agriculture, thereby rendering the judicial decree totally unnecessary according to the petitions. The petitions

also recited that the court had appointed two trustees of the stock held by Swift and Armour in public stockyard companies, pursuant to the provisions of the decree directing disposal of this stock, and that after full and lengthy public hearings at the stockyards these impartial trustees had found nothing unfair, illegal, or discriminatory in the operation of the stockyards, terminal railroads, or other facilities. Since the entry of the decree, the petitions reported, the Department of Agriculture had undertaken a program of livestock market reporting which made precise information readily available by wire and radio to livestock producers throughout the country, and destroyed any monopolistic control the defendants might have exerted through ownership of stockyard newspapers and market journals. In 1921, the defendants averred, the Interstate Commerce Commission, in a hearing upon the complaint of wholesale grocers, concluded that the defendants' ownership and use of refrigerator cars gave them no unfair advantage or preference. (*National Wholesale Grocers Ass'n.* v. *Alabama & Vicksburg Ry.*, 62 I.C. Reports 375, June 22, 1921). Finally, the defendants relied upon the decision of the Secretary of Agriculture in proceedings commenced by him in 1923 to inquire into the Armour acquisition of the physical properties of Morris & Company. After exhaustive hearings under the Packers and Stockyards Act, the Secretary had concluded that the merger would not have the tendency or effect of restraining interstate commerce or of creating a monopoly, and that competition in the meat industry was keen and active.

Factual change as well as legal development showed, according to the petitions, that the defendants no longer occupied a dominant position in the meat industry. None of the defendants individually enjoyed a share of the business that would amount to monopoly, and their combined share of the total slaughter of livestock in the United

States had fallen since the decree from 48% to 36%, and their combined share of federally inspected slaughter fell from 69% to 54%. The total sales of each of the defendants, measured in dollars, were lower in 1929 than in 1920, while the sales of competing meat packers increased. At the same time the defendants' margin of profit on sales was low and declining, while the profit margin of the smaller packers was greater and increasing.

The defendants' distributive facilities no longer served to give them a commanding competitive position in the meat industry, they alleged. The refrigerated railroad cars owned by the defendants conferred no advantage, since the development of motor trucks and the construction of hard-surfaced roads during the ten years since entry of the decree had provided competing packers with an effective means to reach consumers. The branch house system of the defendants was being rendered obsolete, according to the defendants, by the trend toward integration and mass selling. Since the decree, grocery chains had established their own distributing depots, taking large shipments directly from packing plants. As a result, the defendants were forced to use their branch houses principally to serve the small independent retailer, in decreased volume and at higher cost per unit sold. In consequence, the defendants had been forced to close a number of branch houses, and to operate others at a loss.

In the second branch of the defendants' petitions for modification, they claimed that any dominance they might still enjoy in the meat industry could no longer be carried over into the marketing of other foods, in view of the claimed revolution in merchandising methods. This revolution was characterized principally, according to the petitions, by widespread integration in the food business, by mass selling, by the growth in use and importance of

private brands, and by wide diversification of products handled at each market level. At each level, it was claimed, large, and powerful concerns had emerged, offering a countervailing power to the defendants' and eliminating any danger from the defendants' entry into other branches of the food industry.

Retailing.

At the retailing level, the petitions relied upon the rapid growth of the chains to demonstrate that the decree was no longer needed. Since 1920, they alleged, the number of chain retail outlets had increased from 27,000 to 75,000, and their total sales had nearly trebled until they held 40% of the total retail grocery business. The largest of these chains, A & P, had total sales in excess of one billion dollars in 1929, roughly equalling the total sales of the largest defendant, and the total sales of all chains were said to have grown to approximately three and one-half billion dollars annually.

A parallel development since the entry of the decree was the growth of the so-called voluntary chains, established either by a grocery wholesaler contracting with a number of independent retailers to supply their grocery needs and to furnish merchandising and managerial assistance, or by a group of independent retailers associated together to conduct cooperative wholesale operations. The number of retail stores so integrated and combined had grown to 60,000 by 1929, according to the petitions.

In view of the strength of these retailers, it was said, there was no longer anything to be feared from the defendants' entry into the grocery business as competing retailers. The chains generally enjoyed a higher margin of profit than the defendants, it was claimed: comparing five selected chains with the defendants, profits as a

percentage of sales were 2.7% for the chains to 1.3% for the defendants, as a percentage of net worth, 23% for the chains to 5% for the defendants, and as a percentage of investment, 17% for the chains to less than 5% for the defendants. At the same time the chains benefited from a higher proportion of equity investment, relying upon borrowing for only 2% of their funds as compared with the 30% borrowed by the defendants, and enjoyed more available working capital.

Another marketing change alleged by the petitions was the rapidly accelerating trend toward combination stores, that is, stores selling both meats and groceries. At the time of the entry of the decree in 1920, it was claimed, only a few hundred retail outlets handled both meats and groceries, while by 1929 an estimated 20% of all meat sales were made by combination stores. The trend was especially rapid among chains, which had begun to sell meats, it was alleged, in an estimated one-third of their stores.

These developments rendered the prohibitions against the defendants' retailing meats both unnecessary and unjust, it was said. In view of the combined power of the chains as meat retailers, the defendants could no longer assume control of that market and the protection of the decree was not needed. And the decree was rendered unjust since this integration reduced the number of potential buyers for the defendants' meat and left them at the mercy of the large chains, who might simply decline to deal and leave the defendants stranded with a large supply of perishable meats. Deprived of the opportunity to retail their own products, the defendants were placed increasingly at the mercy of the chains as the only outlet to the consumer. Competing packers, however, were free to retail their products, and many operated meat markets.

The defendants also claimed they were handicapped by the innovation of the private brand, affixed by the chain or the retailer to the products sold. To assure continued consumer demand for and acceptance of his products, they contended, a national packer must keep its brand name before the public. Forbidden to retail their own products and compelled to market through others who affixed their own brands, the defendants were losing their standing.

In the face of the trend toward diversified retailing and the combined selling of meats, the defendants claimed that modification of the decree to allow them to sell at retail only meat or groceries would be of no avail. Anything short of combined selling would be impracticable and would not enable them to compete effectively.

Wholesale Groceries.

The integration of retail and wholesale functions in the grocery business as exemplified by the growth of the chains was also relied upon as eliminating any possible anti-competitive effects of the defendants' entry into the handling of groceries at wholesale. Since an increasing number of retail outlets were tied to wholesalers, either in chains or voluntary or cooperative arrangements, the defendants would be foreclosed from that market, they submitted. Their distributive facilities, and particularly, their branch houses, had been displaced by the distributive depots of the chains, and could be used principally to serve the small independent retailers with both meats and groceries. In this market, according to the petitions, the defendants would be in competition with 6,000 well-established wholesale grocers with combined total sales of four billions of dollars annually. Upon information and belief, it was alleged that many of these wholesalers handled meats as well as groceries. Many, in addition, had developed im-

portant brands, and had branched into retailing and manufacturing. No danger of monopoly would result from the defendants' entry into the business of wholesaling groceries along with meats, it was claimed.

Production.

The preceding decade had been marked, the petitions alleged, by the growth of a number of large firms and corporations engaged in the production, processing, and manufacturing of foods. Through mergers and acquisitions, these concerns had diversified to offer a wide range of products, many with significant brand names. The annual sales of the largest exceeded one hundred million dollars, and the average profits as a percentage of sales for seven of these large food concerns was 7% as compared with an average of 1.3% for the four defendant meat packers. Some of these food producers and manufacturers carried on their own distributing and wholesaling operations, and others maintained retail outlets as well. Several were engaged in meat packing or processing, and, the petitions continued, there were prospects of further mergers of meat packing and grocery manufacturing. Some of the defendants' competing meat packers, too, it was charged, had begun to deal in groceries. The defendants, however, were denied the opportunity of diversifying to avail themselves of economies in selling and distributing. Modification of the decree, they argued, would allow them to take advantage of modern marketing techniques, to help preserve the small independent retailer, to increase competition and thus to reduce prices to the ultimate consumer.

Upon these grounds, Swift and Armour prayed for modification of paragraphs Two, Three, Four, Five, and Six of the decree, so that they might own or retain interests

in stockyards, terminal railroads, and stockyard newspapers and market journals, to allow them to deal generally in any non-meat grocery products and to make use of their distributive facilities in handling those products, and to sell meats through retail outlets.

Swift's petition asked in addition for relief from the prohibitions of paragraphs Seven and Eight of the decree, forbidding ownership of public cold storage warehouses and the handling of fresh milk and cream respectively. Concerning fresh milk and cream, Swift alleged that its procurement of raw milk for the manufacture of butter and cheese, permitted to the defendants by the decree, was impeded by the prohibition against dealing in fresh milk. Prices paid to farmers for milk to be resold fresh were higher, it was claimed, than the prices paid for milk to be used for butter or cheese. With the growth of cities, fresh milk dealers were extending their purchasing operations further into the rural areas, driving the defendants out of the market. The fresh milk prohibition also made it more difficult for the defendants to obtain eggs and poultry, as permitted, since the farm producers preferred to sell their poultry products to a purchaser who could also buy dairy products, and could sell them livestock feeds. Since the decree prohibited the defendants from dealing in fresh milk and cream or feeds, they were handicapped in permitted activities as well.

Neither The Cudahy Packing Company nor Wilson & Co., Inc., filed a petition for modification in these 1930 proceedings. Attorneys for both appeared in open court, however, to state that while they did not request modification, they would consent to any modification that might be ordered by the court, provided that it should be granted equally to all defendants.

Upon the government's general denial of the allegations of the Swift and Armour petitions, the matter was heard at length before Judge Bailey in the Supreme Court for the District of Columbia. At the conclusion, Judge Bailey ruled in opinion that the petitions should be denied in part and granted in part. The divorcement of all interest in stockyards, terminal railroads, and market journals was still commanded because of the "many opportunities for secret preferences . . . and distortion" afforded by their control. On the other hand, because the combination among the defendants had been ended, and they had no monopoly, and because it is "an extreme mea. . . . to prevent anyone from making an economic use of his facilities," the decree was modified to allow the defendants to employ unused space in their refrigerator cars and branch houses for handling the previously prohibited grocery items, and to allow the defendants generally to manufacture and deal in all commodities other than at the retail level.

As to retailing, however, Judge Bailey took a different view. "The control by the defendant of the great amount of interstate commerce in meats and other articles from the producer to the consumer would probably result in the almost complete annihilation of the independent retail grocer . . . ," he concluded. To enter into the market, the defendants would have to buy out many retailers now in business, and would become competitors of present customers. Even the unused power to engage in retailing would present dangers of abuse, he noted. Since in his opinion to allow the defendants to integrate in this direction would be inconsistent with the Congressional policy to preserve and stimulate competition, Judge Bailey continued paragraph Six of the decree in full force and effect, to forbid the defendants to own or operate retail meat markets. For the same reasons, his modification of

the prohibitions on grocery dealing did not extend to the retail level.

Swift's request for relief from paragraphs Seven and Eight of the decree, enjoining the ownership of public cold storage warehouses and the handling of fresh milk or cream, were also denied.

In accordance with his opinion, Judge Bailey entered an order modifying the decree by confining the prohibitions of paragraphs Three, Four, and Five to retail dealing alone. The United States appealed from this order directly to the United States Supreme Court. The intervenors, American Wholesale Grocers Association and National Wholesale Grocers Association, joined in the appeal to contest the modification. The defendants did not appeal, however, from that portion of the order which denied modification.

In an opinion that is the focal point of this litigation, the Supreme Court reversed the modification order and reinstated the original decree in full. *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). Three of the Justices took no part in the decision. Of the remaining six, Justices Butler and Van Devanter dissented. The opinion for the majority of four was written by Justice Cardozo.

After this judgment of the Supreme Court was handed down in 1932, the decree took full effect without qualification for the first time since its entry. The defendants brought themselves into compliance by disposing of their interests in stockyard companies, terminal railroads, and market journals. The defendants divested themselves of their interests in concerns handling prohibited groceries and other items. Swift, for example, sold its substantial interests in Libby, McNeill & Libby. Retail meat markets were closed or sold to others. The defendants wound up their businesses in prohibited non-meat foods, and dis-

continued use of their distributive facilities in handling those foods. Forbidden interests in public cold storage warehouses were divested. In sum, the general grocery business was divorced from meat packing, and the defendants were divested of facilities and interests which were outside the scope of the meat packing business. The defendants thenceforth were confined in the main to purchasing livestock, slaughtering, dressing, processing, and distributing and selling meats and meat products at wholesale. They have continued to carry on the business of processing and dealing in the by-products of slaughter, including hides, hair and tallow. They have also engaged in the manufacture, processing, and sale of grocery items not prohibited by the decree, including butter, eggs, oleomargarine, poultry, cheese, ice cream, dog food, lard, peanut butter, shortening, soaps and cleansers, salad and cooking oils, and foods containing vegetables in combination with meats. Beyond the food industry, Wilson & Co., Inc., has diversified heavily and successfully in the manufacture of sporting goods, and Armour in the field of chemicals.

THE CURRENT PETITIONS.

The consent decree remained in force without further litigation fo a period of twenty-four years after the Supreme Court denied the requested modification in 1932. In 1956, the current phase of the controversy opened when Cudahy filed its petition for modification of the decree in the United States District Court for the District of Columbia, successor to the Supreme Court for the District where the decree was entered. Later, in 1956, similar petitions were filed on behalf of Swift and Armour. No petition has been filed and no appearance has been entered on

behalf of Wilson & Co., Inc., the other remaining defendant.

The three petitions were separately prepared and independently filed, but they are sufficiently similar in the substance of their content to permit combined summarization. The underlying theory of all three is the same as that relied upon in the 1930 petitions, that is, that the decree has become both unnecessary and unjust as a result of radical changes in the meat and food industries which have taken place since the earlier proceedings. As in 1930, the defendants submit that today they have no monopolistic control or dominant power in meats, and, even so, that it would be impossible today to wield any such power to achieve an anti-competitive position in the non-meat food industry. Again it is claimed that enormous and unforseen technological and marketing changes have so altered the structure of the industry that the decree today no longer promotes the policies of the antitrust laws, but on the contrary restricts desirable competition.

With few exceptions, the changes relied upon in the current petitions are developments of the same kind and character considered in the 1930 modification proceedings. The trends of change have continued, and the differences are fundamentally matters of magnitude and degree.

Concerning monopolization or dominance in the meat industry, the petitioners repeat that the combination alleged in 1920 does not exist today. Their interests in stockyards, terminal railroads, and market journals have been divested, and the Secretary of Agriculture has assumed supervisory control of the operations of stockyards and of the dissemination of livestock marketing information. With the decline in importance of rail transportation and the increased use of motor trucks for ship-

ping livestock, the competitive advantage flowing from the location of the defendants' large packing plants at the major rail centers has diminished, it is alleged, and an increasing volume of livestock is sold at smaller, scattered stockyards. As a consequence, the defendants' share of the total commercial slaughter has declined further since 1930, the petitions allege. At the same time, the number of competing meat packers has increased, many have gained the advantages of specialization by dealing in a single species of livestock, or by confining their operations either to slaughtering or processing alone. The sales of competing packers have increased more rapidly than the defendants', it is claimed, and these competitors, with lower fixed costs and modern facilities, have enjoyed a higher profit margin.

In the distribution of meat products, the petitions continue, the distributive facilities of the defendants no longer confer a competitive advantage. Refrigerated railroad cars, formerly owned almost exclusively by the defendants, have lost their significance as motor carriers have increased to offer a ready means of transporting meats of all packers. The defendants have reduced their use of rail transportation, and today own a markedly reduced number of refrigerated cars. Many have been retired from use, or sold to independent car operating companies.

The defendants' branch houses have diminished in utility and importance as well, it is alleged. Increased integration, mass selling, and the general availability of refrigerated storage space have altered marketing patterns, and today meat products are more and more shipped in large quantity directly from packing plants to the purchaser. As a result, the defendants have closed a number of branch houses, and the proportion of their total businesses handled through the branch houses has steadily declined.

The cumulative effect of these changes in the meat packing industry, according to the petitions, makes it impossible for any defendant to dominate the market.

As an alternative position, the present petitions, like the 1930 petitions, allege that the defendants' power in the meat packing field could no longer be used as an instrument of domination in other branches of the food industry, and therefore, the petitioners assert, there is no futher need for the provisions of the decree which exclude them from dealing generally in non-meat foods and prohibit meat retailing. Again the present petitions repeat many of the claims made in 1930. It is said that the growth of large concerns at each level of the grocery industry has produced competitive conditions which eliminate any danger of monopolization by the defendants. At the retail level, the trend toward integration has continued. Chain stores, it is alleged, account for roughly half of the nation's food sales, and the growth of voluntary and cooperative chains has made them an almost equally powerful force. Their large financial resources and high profits as compared with meat packers gives them a competitive strength unmatched by the defendants. The development of the supermarket as the principal retail food outlet and the realization of the trend toward combination stores, handling both groceries and meats, have made diversification essential to effective competition at the retail level. Federal grading of meats and the increased use of private brands have tended to reduce the importance of national packers' brand names. Retailers generally, the petitions claim, have adequate alternative sources of meat, and are no longer dependent upon the defendants for their supply. No risks would be incurred under these conditions, it is said, by allowing defendants to retail groceries and meats.

At the wholesale level, the petitions allege, the technological developments have made wholesale grocers vastly more efficient and enhanced their competitive positions. Large, one-floor warehouses with machine loading and unloading, automated inventory controls, and preprinted order forms permit wholesalers to handle vast quantities of groceries in wide variety at a low mark-up. In contrast, the defendant's branch houses are unfit for modern grocery handling, and would afford no overhead advantage in the distribution of groceries at wholesale. The experience of the defendants in marketing the non-meat products open to them under the decree demonstrates, it is claimed, that the defendants have not and could not tie groceries to meat and thereby employ any dominance in meats as a competitive wedge into the grocery market.

In the field of food processing and manufacturing, it is alleged, the years since 1930 have seen the growth of many concerns to a position of near equality, in value of assets, with Swift and Armour, and surpassing Cudahy. Widely diversified, these companies employ extensive advertising programs and scientific promotional techniques, and make use of new and improved methods of processing, packaging, distributing, and displaying their products.

Concerning the provisions of paragraph Eight, the defendants claim that the prohibition against dealing in fresh milk or cream has produced unexpected hardship in the conduct of the permitted butter, cheese, and ice cream business, as a result of government milk marketing controls.

The decree therefore is claimed to place the defendants at an unwarranted competitive disadvantage. Profits in meat packing are among the lowest in the food industry.

and the defendants are deprived of profit-making opportunities by their exclusion from the areas of greater return. As a result, the defendants have sustained losses since the entry of the decree, and have suffered by reason of this inequitable treatment.

On these grounds, the three petitioners seek modification of paragraphs Three, Four, Six, and Eight of the decree, to allow dealing in groceries and dairy products without restriction at all levels of the market, to allow re-acquisition of interests in grocery concerns, and to permit them to sell meats at retail. In short, they seek vacation of the heart of the decree. Of the nine paragraphs of the original injunction which imposed substantive prohibitions, five would remain in force. Two of these, paragraphs One and Nine, are general in their terms, and amount to no more than admonitions to obey the law. Paragraph Two, forbidding ownership of stockyards, terminal railroads, and market news journals, would remain in force, but would add little of substance to the regulatory control now exercised by governmental agencies. Paragraph Seven forbids the defendants' ownership of public cold storage warehouses. Cudahy alone has requested modification of this restraint. And on behalf of E. A. Cudahy, Jr., alone, a request is made for the modification of paragraph Five, which prohibited each of the individual defendants personally from owning a controlling interest in any company or concern dealing in the grocery commodities prohibited to the corporate defendants.

To these petitions, the government filed an answer denying generally the factual allegations, and affirmatively setting up the 1932 decision of the Supreme Court, denying modification, as *res judicata*, or, alternatively, as precluding re-litigation of matters which occurred before 1930. The answer, in conclusion, sets up the claimed in-

sufficiency of the allegations of the petitions, both legally and factually.

In 1958, the cause was transferred upon the motion of the defendants under Section 1404(a) of the Judicial Code, 28 U.S.C. § 1404(a) (1948), from the District of Columbia to this court. The government's motion for summary judgment was denied by Judge Miner of this court for lack of a showing that a full hearing was unnecessary. A petition for leave to intervene was presented on behalf of Western States Meat Packers Association, Inc., and Texas Independent Meat Packers Association, two organizations representing smaller packers, and on behalf of four small meat packing companies. The petition for intervention was denied, and instead the applicants were given the right to submit a written brief as *amici curiae* and to participate in the oral arguments after the close of the evidence.

QUESTIONS PRESENTED.

The voluminous record and extensive arguments in these proceedings reveal few sharp disputes of fact. In general, the parties are agreed upon the statistical information presented, and upon the observable facts which describe the structure and patterns of the food industry today. The factual portion of the controversy is therefore concentrated upon the conflicting inferences which might be drawn from the admitted facts, the question of the characterization of prevailing market conditions, and the application of the standards, tests, and measures for the modification of an equity decree entered upon the consent of the parties. The conflict is concerned more with the significance of facts than with their existence.

The disagreement upon matters of law is also narrow. All the parties are agreed that the decision of the Supreme Court upon the appeal of the earlier modification

proceeding is controlling in large degree here. They disagree, however, upon the manner in which that decision controls and upon the extent to which it is dispositive. The parties also disagree upon the proper interpretation of the Supreme Court's opinion in the prior appeal, concerning the test laid down for modification. Upon this question of the reading of Justice Cardozo's opinion for the majority, the petitioners disagree not only with the government but with each other as well.

THE EFFECT OF THE SWIFT DECISION.

Turning first to the legal question of the effect of the Supreme Court's decision regarding the prior petition, reported as *United States* v. *Swift & Co.*, 286 U.S. 106, it is conceded without dissent that the opinion provides a direct precedent for this proceeding. In the years since its rendition, the decision has attained the position of a leading case in the field. It has been cited as authoritative in more than one hundred subsequent decisions, both in the lower courts and by the Supreme Court itself. Nothing has been decided since to cast doubt on its continued vitality or to limit its scope. Under the principles of *stare decisis*, basic to our legal system, its force must be heeded. The obligation of obedience is heightened by the fact that the decision was rendered by the highest court in the land. In the hierarchical structure of the federal judiciary, the District Courts are bound by the law as declared by the Supreme Court. We are not free to disagree, to disregard in the guise of reinterpretation, or to speculate upon probabilities or personalities. "In any event, the District Courts as well as the Courts of Appeals must follow the decisions and interpretations of our highest court in spite of any individual predilections that may exist." *United States* v. *Chase*, 281 F.2d 225 (7 Cir., 1960).

But the *Swift* decision is more than a well-reasoned case in point for this proceeding. The opinion was handed down in the very case now to be decided. In reversing the lower court's order and remanding the case to the District Court, the United States Supreme Court gave specific directions to govern the further course of the proceeding. The circumstances offer no leeway for departure from those directions.

The determination of the trial court in the 1930 proceedings, the Supreme Court for the District of Columbia, is entitled to deference as well. To the extent that Judge Bailey's findings were not put before the United States Supreme Court because the petitioners there did not cross appeal, his determinations stand as final and conclusive for that proceeding. Under the doctrine known as the law of the case; the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit. See *J. C. Millett Co. v. Distillers Distributing Corp.*, 185 F. Supp. 874 (N.D. Cal. 1960). Orderly and consistent progress of the case requires that the parties be precluded, with rare exceptions, from re-opening and re-arguing matters already decided.

On behalf of Cudahy, it is argued that the effect of the 1930 proceedings is qualified by the fact that Cudahy did not then petition for modification and did not participate in the trial court hearing or in the appeal. Therefore, it is said, Cudahy is not bound by the decisions rendered either by the Supreme Court or the trial court. From the record it appears that an appearance was entered on behalf of Cudahy in the 1930 proceedings solely to state that while it did not seek modification of the decree, it would consent to such modification as the court might order, provided that it be made applicable to all

the defendants. Accepting this position, Judge Bailey entered an order modifying the decree as to all defendants, including Cudahy, and the Supreme Court's reversal reinstated the decree as to all.

Cudahy's position amounts to an attempt to eat the cake and have it, too. It sought to share in the benefits resulting from the efforts of Swift and Armour to modify the decree, while claiming to be free of the burden of an adverse determination. Had Judge Bailey's order stood unreversed, Cudahy would have gained. With the appeal lost, however, Cudahy claims no prejudice, and asserts the right to re-litigate the questions. As a general rule, a person who allows another to represent his interests in litigation is bound by its conclusion to the same degree as the parties of record. See Restatement, Judgments § 85, pp. 402-3 (1942). It is unnecessary to decide that Cudahy is bound under this principle to the same extent as Swift and Armour, however. The Supreme Court's decision in the prior appeal stands as the authoritative declaration of the principles which must control the disposition of Cudahy's petition. In these circumstances, whether this court's duty of obedience is based upon doctrines of *stare decisis* or upon the more direct command of the rule of the law of the case is of no consequence. In either event, Cudahy is bound by the *Swift* decision.

Not content to rely on the Supreme Court's decision as declaring the applicable rules for this proceeding, the government in its answer and briefs has claimed that the decision raises the bar of *res judicata* against the present petitions. The government thus invokes the settled rule that a claim or cause of action once litigated between the parties may not be re-litigated between them. See *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876). If accepted, the argument would mean that once having re-

quested modification and lost, the defendants would be forever barred from seeking modification in the future. The specific reservation of jurisdiction to modify contained in paragraph Eighteen of the decree would lose much of its meaning. An equity decree of the kind here involved looks to the future. In this respect it is unlike the typical judgment in an action at law, which determines rights arising from the fixed facts of a transaction past and closed. In contrast, the essential characteristic of the equity decree is its flexibility and its responsiveness to changed conditions. So far as it depends upon completed occurrences, the injunction is conclusive, but in its prospective application the decree is always open to reconsideration. The petitioners are not barred, therefore, from requesting modification anew. In the *Swift* decision itself, the principles were laid down by Justice Cardozo:

> "A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. [Citations omitted.] The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative." 286 U.S., at 114.

As an alternative to its claim of *res judicata*, the government invokes the related doctrine of collateral estoppel to limit the scope of the issues in this proceeding. Collateral estoppel supplements *res judicata* and applies to prevent the re-litigation of issues of fact or law previously decided between the parties. See Polasky, *Collateral Estoppel*, 39 Iowa L. Rev. 217 (1954). The doctrine comes into play when the absolute bar of *res judicata* does not obtain. Unlike *res judicata*, collateral estoppel extends not to all claims, defenses, and issues that might have

been raised by the parties, but only to those issues actually contested and decided. Applied here, the doctrine would foreclose re-litigation of questions of fact and law decided in the 1930 proceeding. The government argues upon this basis that the petitioners are limited in their showing to changes in conditions which are different "in kind or character" from the changes considered in 1930, and asserts that mere continuation of trends begun in the decade of the 1920's cannot be considered. The underlying question, however, is the identification of the issues litigated and decided in those proceedings. Changes found by the court to exist as a matter of fact and decided as a matter of law to be insufficient must be rejected as insufficient here. Changes not considered in 1930 are open to independent consideration now. The government's argument supposes that change has a single dimension, and that nothing is added by an increase in magnitude so long as the direction of change remains the same. The argument presses too far. The decision in the earlier proceedings establishes conclusively that the changes proved by the evidence then before the court do not suffice for relief from the decree. To the extent that the evidence proved not only changes then already complete, but in addition changes reasonably certain to accrue in the future, and to the extent that the court accepted the prediction as fact but rejected it as grounds for modification, the fulfillment of the prophecy adds nothing. On the other hand, the continuation of a trend of economic change deserves consideration here if the degree of change was not anticipated in the 1930 proceedings, and therefore was not the subject of decision.

The doctrine of collateral estoppel presupposes a final judgment between the parties. When as here the subsequent proceeding constitutes a continuation of the same

case, the controlling principle might more accurately be termed the law of the case. In either event the consequences are the same. What has been said serves also to dispose of a corollary argument of the government, that changes which occurred between the entry of the decree in 1920 and the hearing upon the prior petitions in 1930 cannot be cumulated with changes which have occurred since 1930 to justify modification. But the Court in 1930 did not decide that the changes up to that time had no force or significance whatever. It held only that those changes did not satisfy the requirements for modification of the decree. Those changes did not amount to nothing; there were rather not enough. In determining whether a case for modification has been made, then, the starting point is the entry of the decree itself, and all subsequent change must be measured against the applicable standard. The 1930 decision operates as a bench mark and not as the base.

THE TEST FOR MODIFICATION.

The power of this court to modify the decree, reserved by the decree itself and declared in the *Swift* decision, 286 U.S., at 114-15, is conceded and not in dispute. That it was entered upon the consent and agreement of the parties does not make it a contract between them. The injunction is nonetheless a judicial act, subject to alteration as a decree entered after litigation would have been. The parties are in disagreement, however, concerning the test by which the grounds for requested modification must be measured.

At the outset, it is clear that the test is not that which controls the issuance of an original decree. This court is not at liberty to substitute its judgment upon the question whether the injunction as entered in 1920 was in

accord with equitable principles under the circumstances then prevailing. The decree was accepted by the defendants, and the Supreme Court has twice held that they are not free to attack it. *Swift & Co. v. United States*, 276 U.S. 311 (1929); *United States v. Swift & Co.*, 286 U.S. 106 (1932). The petitioners' reliance upon decisions regarding the appropriate scope and function of an equity decree, in cases where those questions are open to consideration, is therefore misplaced. And for this reason the observations of this court in *United States v. National City Lines*, 134 F. Supp. 350 (N.D. Ill. 1955), have no application.

The initial inquiry, all concede, is whether the original need for the decree still exists. As stated for the Court by Justice Cardozo, the question is whether "dangers, once substantial, have become attenuated to a shadow." 286 U.S., at 119. It bears repeating, however, that the test is not whether this court would issue the existing decree as an original matter under the circumstances which obtain today. The decree is above impeachment, and if present-day conditions are substantially the same as conditions in 1920, to modify would be to reverse. It is our duty to ask not whether the decree is needed today, but whether if it was needed in 1920, the intervening changes have eliminated that need.

The parties are in disagreement upon the further inquiry directed by the Supreme Court's test for modification. Justice Cardozo, in the introductory portion of his opinion regarding the power to modify, remarked that a court in entering a consent decree "does not abdicate its power to . . . modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an *instrument of wrong*." 286 U.S., at

114-15. Later in the opinion, after discussing the question of need and concluding that need still existed, Justice Cardozo remarked, "No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression. Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." 286 U.S., at 119.

The parties are irreconcilably at odds in their interpretation of these pronouncements. Petitioners take the position that the Supreme Court meant to say that the absence of need and the existence of hardship are alternative routes to modification. In their view, a decree should be modified if it is no longer necessary to safeguard the public interest or, even if protection is still needed, if the decree inflicts hardship upon the defendants as the result of changed conditions. The government in opposition seems to argue that both the absence of need and the presence of grievous hardship must be shown to warrant modification. Again, in its brief, the government appears to regard hardship as a subsidiary issue in the application of the test of continued need. In this view, apparently, need must be regarded as continuing so long as the defendants have not undergone any major substantive change; if they have been weakened by hardship, the need would be diminished.

Neither party's reading of Justice Cardozo's language comports entirely with the objects of equity jurisdiction in antitrust enforcement. The underlying policy is protection of the public interest in competitive economic activity. The equity decree is not an instrument of punishment; the infliction of penalties may be sought where appropri-

ate through criminal proceedings. Protection for the public is therefore to be achieved so far as possible without visiting unnecessary hardship upon the defendants. Here, as elsewhere, the use of equity power requires that a balance be struck between the interests of the public and of the defendants. "The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." *Hecht Co.* v. *Bowles*, 321 U.S. 321, at 329 (1944). In this light, the continued need for the decree and the hardship suffered by the defendants are neither alternative standards for modification, either of which will suffice, as the defendants submit, nor cumulative prerequisites, both of which must be established, as the government claims. They are rather correlative elements of a single standard. As need is diminished, a lesser showing of hardship will tip the scales in favor of modification, and as the defendants' suffering increases, their burden of showing decreased need is correspondingly lightened.

There is nothing to alter or limit these principles to be found in *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948), or in *Chrysler Corp.* v. *United States*, 316 U.S. 556 (1942). In both, the government had sought modification of a consent decree to extend its operation. In the *Chrysler* case, the modification was allowed upon the ground that it effectuated the basic purpose of the consent decree, in reliance upon the *Swift* decision. In the *Ford* case, a similar request for modification was denied.

Recent decisions in the District Courts have applied the test vigorously to deny modification of consent decrees. See, for example, *United States* v. *Owens-Corning Fiberglass Corp.*, 178 F. Supp. 325 (N.D. Ohio 1959); *United*

States v. *International Boxing Club of New York, Inc.*, 178 F. Supp. 469 (S.D. N.Y. 1959).

The generalized language of Rule 60(b)(5) of the Federal Rules of Civil Procedure, promulgated since the *Swift* decision, does not alter the test. The Rule authorizes relief from a decree when "it is no longer equitable that the judgment should have prospective application." There is nothing in the Rules, their history, or their commentary to suggest that the words were intended to do more than to adopt the standard evolved in *Swift* and other decisions.

In determining whether changes in economic conditions since the entry of the original decree have occurred in a degree to meet this test, the developments must be viewed in a frame of reference. As Justice Cardozo observed, "Life is never static. . . ." Change is inevitable, but it is only change that reaches the underlying reasons for the decree that is relevant. Conditions existing at the time of original entry must be compared with conditions at the time of requested modification, and the significance of the difference measured in the light of these original reasons. The fact that a decree is entered by consent rather than upon litigation does not deprive the court of power to modify, as the Supreme Court declared. 286 U.S., at 114. The difference has a profound effect, however, upon the task of the judge in ruling upon a request for modification. Here no evidence was introduced to supply a factual foundation for the restraints. No findings of fact were made, and no opinion was delivered to explain the legal purposes of the decree. Any attempt to determine now exactly what facts existed in 1920 would be difficult at least, and even if it were possible, the process would involve a trial of issues which the parties solemnly agreed need not be tried. It is likely that in the negotiations leading to the compromise, each party proceeded upon different

factual information and presuppositions. These facts are not necessarily those that would have been found had the case been litigated in 1920, and certainly not those that would emerge from a 1960 trial of 1920 conditions.

The decree here in issue bears traces of compromise. For example, the complaint demanded that the defendants be divested of their instruments of monopoly, including not only stockyards, terminal railroads, and market news journals, but refrigerator cars and branch houses as well. The decree as entered allowed the defendants to retain these distributive facilities for meat products. Again, the complaint demanded an injunction against the defendants' dealing in nine named classes of non-meat foods, but the decree permitted them to continue to handle four of these nine classes. The defendants were allowed peanuts but denied other nuts; they were allowed cigarettes but not cigars; and they were allowed butter and cheese but not fresh milk and cream.

To a degree, therefore, the factual foundations for the injunction and the reasons supporting it must rest in conjecture. The task of decision is doubly hypothetical since an unknown past must be compared with a speculative future, involving a prediction of what action the petitioners might take if the decree were relaxed. Nonetheless, if modification is to be possible without impeachment of the decree, its reasons must be identified from the best evidence available. At the same time, unless the solemn judicial act taken upon the considered consent of all the parties is to be stultified, the decree must enjoy a solid presumption that it was founded on fact and supported by reason.

The petitioners therefore bear the burden of proof on their petitions, and the burden is heavy. They have no

standing to complain, as they have argued, that the government has failed to show any palpable threat of future violations of law on the part of the defendants. The burden on the issue is theirs. Nor is it enough to assert, as they have, that the prohibited activities are not unlawful. They must go further and show that the decree when entered was supported by conditions which have so altered with the passage of time that the restraint can no longer be justified, and that they are suffering injury, without counterbalancing advantage to the public interest, sufficient to move a court of equity to act. It is of no avail to argue, as they have, that the antitrust laws, including revised Section 7 of the Clayton Act, concerning mergers, and the Robinson-Patman Act, concerning predatory price-cutting, now provide ample remedies for future violations. The public now enjoys the specific protections of a decree. The defendants' contention that the general law also forbids the conduct would be equally available to prevent the issuance of any injunction against future conduct, and would render the equitable remedy largely nugatory.

The petitioners' burden is heavy, but it is not therefore unfair. Its effect in practice may be to perpetuate a decree that was unwarranted from the beginning. The defendants' mistake in giving consent will remain beyond recall until the decree operates to oppress him in ways uncontemplated at its issuance, or until circumstances have so changed that the foundations of the decree, whether adequate or not, are completely undermined. The way of escape is narrow. A broader avenue would destroy the utility of consent decrees. If a composition reached after full and deliberate consideration may be set for nought simply because one of the parties on second thought believes he would have fared better at a trial, the decree becomes nothing more than a continuance or postpone-

ment of the trial, and the mutual benefits which induce this form of disposition will be lost.

In the conferences that led to the decree, the defendants were not untutored innocents at the mercy of an overweening government. The evidence of compromise in the decree suggests their power to bargain. They gained significant advantages through their consent. They were spared the expense, burdens, and publicity of a full trial, and avoided the risk of more drastic relief that might have required division of their gigantic operations. Unlike a litigated decree, the consent decree would not serve as the foundation for private antitrust suits.

A consent decree is a double shield, protecting the defendant as well as the public. E.g. *Ford Motor Co.* v. *United States*, 335 U.S. 303 (1948). Indeed its use has been criticized as immunizing the defendants' unlawful conduct in cases where the government representatives unwisely accept less than the public interest demands. See Dabney, *Antitrust Consent Decrees*, 68 Yale L.J. 1391 (1959). These very defendants were some years ago the direct beneficiaries of the decree they now attack. When in 1948 the government filed a new suit, seeking dismemberment of the individual defendants' meat packing businesses into competing enterprises, the defendants sought and obtained a ruling from the trial judge that, because of this consent decree and its subsequent proceedings, no evidence relating to occurrences or conditions before the 1930 modification proceedings could be received. *United States* v. *Armour & Co.*, Civ. No. 48 C 1351 N.D. Ill., Sept. 15, 1948. Faced with this handicap, the government felt obliged to dismiss its suit.

The defendants can gain nothing from the recital in their stipulations to the decree that they consented upon

condition that its entry should not be considered an admission or the decree an adjudication that they had in fact violated any law of the United States. By their consent, they relinquished the right to insist that an offense be proved, and the right to show that no violation had been committed. Having accepted a decree drawn on the theory of a violation of the antitrust laws, they cannot now vacate or modify the decree on the ground that the theory was unsound. *Swift & Co. v. United States*, 276 U.S. 311 (1929). The decree is entitled to every presumption necessary to sustain it.

To determine whether the changes relied upon by the petitioners meet the *Swift* test, it is necessary first to identify the reasons underlying the original decree, since it is these reasons which lend relevance to change.

The petitioners agree in the position that a principal reason for the provisions here in issue, prohibiting and dealing in a proscribed list of grocery items and the operation of retail meat markets, was the defendants' ownership and control of a nationwide system of distributive facilities. It appears to be Swift's position that the distributive facilities supplied the *only* foundation for these portions of the decree.

The petitioners' argument is based upon the remarks of Justice Cardozo in the *Swift* opinion that:

> "Two reasons, and only two, for exacting the surrender of this adjunct of the business were stated in the bill of complaint. . . .
>
> The first was that through the ownership of refrigerator cars and branch houses as well as other facilities, the defendants were in a position to distribute substitute foods and other unrelated commodities with substantially no increase of overhead. . . .

> The second reason stated in the bill of complaint is the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated." 286 U.S., at 115, 116.

Swift takes the position that the second reason stated, the defendants' price-cutting, is merely subsidiary to the first, since the overhead advantage conferred by the distribution system alone permits such price cutting. Thus Swift argues, and Armour and Cudahy concur with qualifications, that the decline in the defendants' distributive systems, through the closing of branch houses and disposal of refrigerated railroad cars, is sufficient of itself to require granting of the requested modification.

The argument fails to give weight to two significant qualifications which Justice Cardozo took care to state. First, the reasons are said to be the only two "stated in the bill of complaint." From the nature of the subject matter, pleadings in antitrust cases are necessarily general and conclusory. *Swift and Company* v. *United States*, 196 U.S. 375 (1905). The government is not obliged to set forth all the reasons upon which it relies, and the fact that any appeared was largely fortuitous. Since these reasons were obvious and sufficient to dispose of the appeal, it was unnecessary to look further. But as Justice Cardozo recognized later in the course of the opinion, there is nothing to confine the court to the complaint in seeking the reasons for the decree.

Justice Cardozo's second qualification was that these reasons applied to the adjunct of the decree before him. Since Judge Bailey had denied all the defendants' requests except for the modification of paragraphs Three and Four, and since the defendants had not cross-appealed, the only portions of the decree before the Supreme Court

were those forbidding the defendants to handle the grocery items on the proscribed list through their branch houses and refrigerator cars or otherwise at wholesale, or to produce or manufacture these items. The cost advantages of distributing groceries with meats were enough to support the original decree in these aspects. But these reasons would not support the provisions of paragraph Six of the decree, prohibiting the ownership or operation of retail meat markets, as the defendants have recognized in their argument that the complaint states no reasons for this restraint. It is an independent restriction, unrelated to any economies of joint distribution. Moreover, the defendants were left free to make full use of their distributive facilities for the purposes for which they were designed and best fitted, the distribution of meat at wholesale. Finally, there is no policy that can be gleaned from the antitrust laws to prevent a businessman, without more, from taking full advantage of economies in his operations. It is apparent, then, that we must look further for the reasons behind the decree.

The decree itself contains internal evidence of more fundamental reasons. Paragraph Three prohibited use of the defendants' branch houses, refrigerator cars, and other facilities for the distribution of prohibited non-meat foods, either on the defendants' own account or for others. Paragraph Four separately and independently prohibits the defendants from dealing in its specified list of grocery items in any manner, and from owning any interest in a concern engaged in this prohibited business. As Justice Cardozo recognized in his opinion, the several paragraphs of the decree impose independent restrictions, each of which must be complied with. The defendants were not offered the option of observing one or some of the restraints, and compliance with some of the prohibitions was

not to excuse obedience to the remainder. Applying this rule of interpretation to paragraphs Three and Four, it is clear that the prohibition against the defendants' grocery dealing was not dependent upon use of the distributive facilities for the purpose. The basic purpose was rather to divest the defendants of their grocery businesses, and to establish the grocery and meat operations as separate enterprises. In this light, the prohibition against the use of distributive facilities becomes, in the language of Justice Cardozo, "merely ancillary" to the general restraint. 286 U.S., at 113.

Some of the defendants concede that "past aggressions" and the defendants' disposition to commit them, as mentioned by Justice Cardozo, form an additional reason for the decree. See 286 U.S., at pp. 117, 118, 119. Modification now is warranted, they assert, since the individual officers who formerly controlled company policies are no longer in power, and since the defendants have remained law-abiding for a substantial period of time. If the argument is accepted, the reasons for the decree are not exhausted. Price cutting and unfair trade practices can be employed as well in the lines of business left open to the defendants as in the prohibited fields. The reason would not, therefore, explain the provisions of the decree here in issue, and changes eliminating that reason would not by the same token eliminate the need.

The underlying purpose appears from the observations of the opinion of Justice Cardozo:

> "Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly [citations omitted], but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the

past. The original decree at all events was framed upon that theory. It was framed upon the theory that even after the combination among the packers had been broken up and the monopoly dissolved, the individual units would be so huge that the capacity to engage in other forms of business as adjuncts to the sale of meats should be taken from them altogether. . . . To curb the aggressions of the huge units that would remain, there was to be a check upon their power, even though acting independently, to wage a war of extermination against dealers weaker than themselves. . . . Groceries and other enumerated articles they were not to sell at all, either by wholesale or by retail. Even the things that they were free to sell, meats and meat products, they were not to sell by retail." 286 U.S., at 116-117.

As the largest meat packers in the nation, with a total market share of more than half, the defendants occupied a dominant and commanding position in the meat industry. As alleged in the complaint, they had achieved their positions of dominance and their gigantic size through unlawful combination and restraint of trade. To avoid rewarding them for past misdeeds, the defendants were to be restricted in the use of the vast power they had acquired. They were prohibited from taking advantage of the dependence of others for meat and meat products, and were forbidden to employ their overwhelming financial resources and established positions as instruments to extend their power into other markets. They were dismembered by the separation of their retailing activities and their grocery businesses. The separation, once complete, was to continue. So long as the power endures, therefore, the divestiture must be maintained, and the defendants forbidden to re-acquire what they were ordered to give up.

It is futile to question whether these reasons could have been established had the defendants insisted on their right to a trial of the issues, or to speculate upon whether the government could more readily agree to alteration of consent decrees without compromising the public interest. The court's function is limited to the determination of the issues put before it, in accordance with the principles laid down by the Supreme Court.

CHANGED CONDITIONS.

Under the test for modification laid down by Justice Cardozo and in the light of the stated reasons for the original decree, the evidence of economic change presented by the petitioners must be evaluated.

Dominance in Meat Packing.

The evidence establishes clearly that the four defendant meat packers today are engaged in active competition with each other. The combination charged in the 1920 complaint and the restraints of trade agreed to in furtherance of the combination have been brought to an end. The defendants' control of livestock marketing has been relinquished through the sale of their interests in public stockyard companies and appurtenant facilities in stockyard terminal railroads, and in livestock journals and market newspapers. Resumption of control would be prevented by the supervisory powers of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, and by the widespread dissemination of accurate and timely livestock market reports through the programs fostered by the Department of Agriculture. These changes had taken place, however, before 1930, and were considered by the courts in rejecting the earlier petitions of Swift and Armour for modification of the decree.

Since the entry of the original decree, the advantages flowing from the location of the defendants' large packing plants at the nation's chief rail centers have diminished. At the entry of the original decree, more than half of all species of livestock was marketed at eleven terminal stockyards. The proportion declined during the ensuing decade, and with the decreasing importance of rail transportation the number of markets has increased and livestock selling has been decentralized. Despite this trend, however, the petitioners Swift and Armour have managed to increase the number of livestock purchased and slaughtered substantially. In 1920, Swift slaughtered 13,235,000 head, and in 1956, the year its petition was filed, 22,847,000. The corresponding slaughter by Armour was 14,853,000 in 1920 and 19,433,000 in 1956. Cudahy's total slaughter rose from 4,028,000 to 5,596,000 in 1950, when a period of decline began. In 1956, Cudahy's total slaughter of all species was 2,958,000 head. In the slaughter of hogs, however, Cudahy's total for 1956 of 2,196,000 slightly exceeded the 1920 figure of 1,932,000. During the period the four defendants' combined share of the total commercial slaughter of the United States has declined from 47% to 38%. Swift's share stood at approximately 17% both in 1920 and in 1956, while Armour's share declined from 19% to 14.5% and Cudahy's from 5.1% to 2.2%.

Since 1930, the defendants' distributive facilities have undergone change. In 1929, the three petitioners owned a total of 933 branch houses for the storage and distribution of meats and other products. As they conceded, some of these facilities were provided for the purpose of handling groceries along with meats, and their capacity in some degree exceeded the needs of the meat business. With the enforcement of the decree after the Supreme

Court's decision in 1932, these branch houses lost some of their utility. With the increased development of volume buying direct from packing plants, the branch houses were gradually reduced in number and efficiency. Swift maintained 430 in 1929, and 270 in 1956. Armour reduced its number from 402 in 1929 to 213 in 1956. Cudahy maintained 101 in 1929, 51 in 1950, and only 11 in 1959. Although a decreasing percentage of the defendants' total meat sales are made through the branch houses, they are still significant factors. For example, in 1956 Armour effected total sales of over one billion dollars through its branch houses, or nearly 50% of its total sales.

The defendants have drastically reduced their ownership of refrigerated railroad cars, and today rely principally upon leased cars, common carriers, and refrigerated trucks for transporting their meat products. No petitioner owns a significant share of the available means of transportation today. The increase in the cold storage facilities of both retailers and wholesalers has made the defendants' provision of extensive refrigerated shipping and storage space unnecessary.

The quantity of meats sold under the private brands of chains, wholesalers, and retailers has increased, and the growth of federal meat grading programs since World War II has tended to widen the markets open to the small competing packers. The defendants still rank as leading meat packers, whose names and products are nationally known, and they spend substantial amounts in advertising to assure continued consumer demand. Since 1930 they have doubled the dollar volume of total sales. Swift's sales increased from approximately one billion dollars at the time of filing the 1930 petition to nearly two and one-half billion dollars at the time of filing the present peti-

tion. Armour's sales increased at the same time from one billion dollars to two billion dollars, and Cudahy's from $268,000,000 to $583,000,000 in 1950. With the decline in Cudahy's business that began in 1950, its sales fell to $291,000,000 in 1956. As a percentage of the meat industry's total sales, the defendants lost ground from their combined total share of 63% in 1930. Still in 1956 they enjoyed a combined 47%. Under competitive pressure, the petitioners have processed a decreasing share of their slaughter, however, relinquishing a more profitable aspect of the business. Thus their sales of uncured hams and so-called green bellies to others for processing have increased in recent years.

As in 1930, the evidence shows the petitioners have operated on the low return of profits as a percent of total sales and as a percent of net worth that characterizes the meat industry generally. In general, their profits have been somewhat below the average of their smaller competitors.

Today the defendants in combined totals own assets in excess of one billion dollars, over half the value of the assets of the entire meat industry. They account for nearly half the nation's meat sales. They slaughter nearly 40% of the commercially slaughtered livestock in the nation. The petitioners remain, to the extent that they were in 1930, the dominating forces in the meat industry. While Cudahy, the smallest of the three, has declined in recent years, it remains one of the nation's largest packers, exceeded by a wide margin only by Swift and Armour, and equalled in approximation only by five competitors.

Changes in the Food Industry.

The petitioners argue that any power which they might retain in meat packing could no longer be carried into

other branches of the food industry in view of the enormous changes that have occurred since the entry of the decree. Large and powerful competitors exist in every branch and level, it is said, to counter the power of the petitioners.

In 1930, Judge Bailey denied the petitioners' request to enter the business of retailing meats and groceries on the ground that their entry would imperil the independent retailer and that the very existence of the power to enter would create dangers of abuse. Since that time the strength of the chains has continued to increase. In 1930, chains of all three kinds (corporate, voluntary, and cooperative) accounted for 60% of grocery sales, and today the figure has risen to 75%. Although the supermarket development had begun by 1930, it has accelerated rapidly until today approximately 74% of all grocery store sales is made by supermarkets, and an even higher percentage of meats is sold in so-called combination stores, handling both meats and groceries. Under modern marketing conditions, it would be impracticable for the defendants to engage in the business of selling either groceries or meats alone at retail. If the defendants were to engage in the business of operating general retail food stores, they would enjoy a substantial advantage over their rivals as a result of their control of nearly half the nation's meats and meat products. Vertical integration through acquisition of existing retail stores or chains would tend to restrain competition by providing the defendants with captive outlets for both their meats and groceries, to the exclusion of competitive products. If, as the petitioners argue, they need the right to experiment in retail marketing techniques to preserve their consumers' acceptance, other methods of marketing research are available.

Concerning the petitioners' request to enter into the

business of grocery wholesaling, it appears from the evidence that their existing distributive facilities would not afford any substantial advantage in the distribution of groceries along with meats. The branch houses now in use for meats are not adaptable for the handling of the large quantities of grocery items required by modern retail outlets. The permitted grocery items sold by the defendants are being distributed to an increasing degree independently of meats, through separate units of the business. Although groceries are commonly bought and sold separately from meats today, the situation resembles that which prevailed before the development of the combination store. Retail outlets are increasingly integrated with wholesalers, and centralized buying of meats has increased, with corporate chains purchasing practically all of their meats under group buying arrangements. Approximately 106 of the 704 voluntary and cooperative chains have group meat buying programs. If the defendants were permitted to sell groceries and fresh milk and cream at wholesale along with their meats, the competitive advantages of offering a full line of products and the economies resulting from large volume and combined managerial and sales staffs would afford the defendants a competitive advantage similar to that which has largely eliminated the butcher shop, the green grocer, and the bakery shop from the retail trade.

Applying the tests dictated by the *Swift* decision, it must be concluded that the petitioners have failed to discharge the burden of establishing that the dangers, if they once existed, have been "attentuated to a shadow" by changed circumstances.

On the correlative question of hardship, it is not enough that the petitioners' profits have been modest, or that

other concerns in the food industry have enjoyed greater returns and more rapid growth. To the extent that the petitioners' hardship is only the denial of the opportunity to diversify into more rewarding branches of the food industry, the burden is not new or unforeseen, but was specifically contemplated in the framing of the decree. Moreover, none of the defendants' competitors, either in meat packing or in grocery manufacture or processing, has diversified to any substantial degree to combine meats and other foods. To the extent the defendants' difficulties, and particularly those of Cudahy, are attributable to causes other than the decree, they may bear on the question of the continued need for the decree, but do not establish hardship in the sense required by the *Swift* decision.

CONCLUSION.

It has been said that the decree itself offends the policies of the antitrust laws since it restrains lawful competition by the defendants. The point illustrates one of the many paradoxes of the Sherman Act, that it is sometimes necessary to restrict competition in order to preserve it. The elimination of three or four potential competitors from the general food industry can hardly be said to harm the public interest, and to whatever extent the defendants would be a significant competitive power in the field, the fears which gave birth to the decree are confirmed.

In its fundamentals, the case involves a giant complex of economic power that has been separated through the decree into its component corporations. Each component has been further dismembered by separation of those extensions of its tainted power which had reached into other areas of commerce. Swift was compelled to dispose

of its substantial holdings in Libby, McNeill & Libby. Armour was forced to terminate its requirements arrangements with California Canneries. The grocery business was divorced from meat packing, and the two enterprises were exposed to independent competition. Having completed this divestiture, the petitioners now seek leave to re-combine, in part upon the ground that divestiture itself has eliminated the need. As vividly pointed out by counsel for *amici* in oral argument, the principle thus proposed would invite the Standard Oil trust, broken up by *Standard Oil Company* v. *United States*, 221 U.S. 1 (1911), now to re-assemble.

In the typical case, it might be safe to presume that after forty years the object of the equity decree will have been achieved if it ever is to be. But this is not a case where equity intervened to correct a temporary dislocation or to afford a respite so that competition could be restored, and time alone is not a remedy. Here the defendants were huge and remained huge after the decree. They chose to retain size as meat packers rather than to risk further dismemberment, at the price of abandoning the opportunity to extend into other fields. The decree therefore operates as a restraint and a fetter to preserve the balance of competitive power. Its usefulness is not exhausted or outworn so long as the petitioners retain the economic might they attained through the combination.

To the extent that this hearing may be considered a trial within the meaning of Rule 52 of the Federal Rules of Civil Procedure, this memorandum shall stand as the court's findings of fact and conclusions of law.

The petitions are accordingly denied.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Monday, December 12, 1960

Present: Honorable Julius J. Hoffman,
District Judge

UNITED STATES OF AMERICA vs. SWIFT & COMPANY, et al.	No. 58 C 613

In conformity with the views of the Court expressed in its Memorandum of Decision filed herein on December 12, 1960, it is

ORDERED that the petitions of defendants Swift & Company, Swift and Company, Inc., Derby Foods, Inc., Armour and Company, The Cudahy Packing Company and E. A. Cudahy, Jr., for an order modifying the decree entered herein by consent on February 27, 1920, be and they hereby are denied.

Government Complaint,

February 27, 1920

IN THE

Supreme Court of the

DISTRICT OF Columbia

THE UNITED STATES OF AMERICA, Petitioner. v. SWIFT & COMPANY, ARMOUR AND COMPANY, MORRIS & COMPANY, WILSON & CO., INC., and THE CUDAHY PACKING COMPANY, and others. Defendants.	In Equity No. 37623

To the Honorable Judges of the Supreme Court of the District of Columbia Sitting in Equity:

The United States of America, by John E. Laskey its attorney for said district, and by Isidor J. Kresel, John H. Atwood and Joseph Sapinsky, Special Assistants to the Attorney General, they being severally, duly authorized to act in said capacities by proper lawful authority, acting under the direction of the Attorney General of the United States, brings this proceeding in equity against Swift and Company, a corporation organized under the Laws of the State of Illinois; Armour and Company, a corporation organized under the Laws of the State of Illinois; Morris & Company, a corporation organized under the Laws of the State of Maine; Wilson & Co., Inc., a corporation organized under the Laws of the State of New York; The Cudahy Packing Company, a corporation organized under the Laws of the State of Maine, (These corporations are

hereinafter referred to as the parent companies) and the following named corporations and individuals, to wit:

ARMOUR DEFENDANTS

Corporations

Armour & Company, a corporation organized and existing under the Laws of the State of New Jersey; Armour & Company, a corporation organized and existing under the Laws of the State of Kentucky; Armour & Company, a corporation organized and existing under the Laws of the State of Texas; Armour & Company, Ltd., a corporation organized and existing under the Laws of the State of Louisiana; The Anglo American Provision Company, a corporation organized and existing under the Laws of the State of Illinois; The Colorado Packing and Provision Company, a cororation organized and existing under the Laws of the State of Colorado; Fowler Packing Company, a corporation organized and existing under the Laws of the State of Maine; Hammond Packing Company, a corporation organized and existing under the Laws of the State of Illinois; The New York Butchers Dressed Meat Company, a corporation organized and existing under the Laws of the State of New York; Atlantic Hotel Supply Company, Inc., a corporation organized and existing under the Laws of the State of New York.

SWIFT DEFENDANTS

Corporations

Swift and Company, a corporation organized and existing under the Laws of the State of West Virginia; Swift and Company, Inc., a corporation organized and existing under the laws of the State of Kentucky; Swift and Company, Ltd., a corporation organized and existing under the Laws of the State of Louisiana; Swift and Company,

a corporation organized and existing under the Laws of the State of Maine; Swift Beef Company, a corporation organized and existing under the Laws of the State of Maine; United Dressed Beef Co. of New York, a corporation organized and existing under the Laws of the State of New York; J. J. Harrington and Company, Inc., a corporation organized and existing under the Laws of the State of New York; Bimbler Company, a corporation organized and existing under the Laws of the State of New Jersey; The G. H. Hammond Company, a corporation organized and existing under the Laws of the State of Michigan; Omaha Packing Company, a corporation organized and existing under the Laws of the State of Kentucky; Plankinton Packing Company, a corporation organized and existing under the Laws of the State of Wisconsin; Sturtevant & Haley Beef & Supply Company, a corporation organized and existing under the Laws of the State of Massachusetts; E. K. Pond Packing Company, a corporation organized and existing under the Laws of the State of Illinois; Van Wagenen and Shickhaus Company, a corporation organized and existing under the Laws of the State of New Jersey; Western Packing Company, a corporation organized and existing under the Laws of the State of Colorado; Hammond Beef Company, a corporation organized and existing under the Laws of the State of Michigan; Omaha Meat Company, a corporation organized and existing under the Laws of the State of California; A. Canfield Commission Company, a corporation organized and existing under the Laws of the State of New Jersey; H. C. Derby Company, a corporation organized and existing under the Laws of the State of New York; Metropolitan Hotel Supply Company, a corporation organized and existing under the Laws of the State of Maine; Vermont Supply Company, a corporation organized and existing under the Laws of the State of

Massachusetts; The Hotchkiss Beef Co., a corporation organized and existing under the Laws of the State of New York; F. and C. Crittenden Company, a corporation organized and existing under the Laws of the State of New York; George Nye Company, a corporation organized and existing under the Laws of the State of Massachusetts; H. L. Handy Company, a corporation organized and existing under the Laws of the State of Massachusetts; Swift Coates Company, a corporation organized and existing under the Laws of the State of Massachusetts; New England Dressed Meat & Wool Company, a corporation organized and existing under the Laws of the State of Maine; North Packing & Provision Company, a corporation organized and existing under the Laws of the State of Maine; The Sperry & Barnes Company, a corporation organized and existing under the Laws of the State of Connecticut; John P. Squire & Company, a corporation organized and existing under the Laws of the State of Maine; John P. Squire & Company, Inc., a corporation organized and existing under the Laws of the State of Massachusetts; John P. Squire & Company, Incorporated, a corporation organized and existing under the Laws of the State of Rhode Island; Springfield Provision Company, a corporation organized and existing under the Laws of the State of New Hampshire; White, Pevey and Dexter Company, a corporation organized and existing under the Laws of the State of Maine.

MORRIS DEFENDANTS

Corporations

Morris Packing Company, a corporation organized and existing under the Laws of the State of Maine; Morris & Company, a corporation organized and existing under the Laws of the State of New Jersey; Morris & Company, a corporation organized and existing under the Laws of the

State of Louisianna; Morris & Company, of Pennsylvania, a corporation organized and existing under the Laws of the State of Pennsylvania; Joseph Stern & Sons, Inc., a corporation organized and existing under the Laws of the State of New York; Brooklyn Beef & Provision Co., a corporation organized and existing under the Laws of the State of New York; Condit Beef and Provision Company, a corporation organized and existing under the Laws of the State of New Jersey; Corwin, Wilde Company, a corporation organized and existing under the Laws of the State of Massachusetts; Donnelly & Company, Inc., a corporation organized and existing under the Laws of the State of Massachusetts; National Hotel Supply Company, a corporation organized and existing under the Laws of the State of Illinois; Chamberlain & Company, Inc., a corporation organized and existing under the Laws of the State of Massachusetts; J. M. Wilson Company, a corporation organized and existing under the Laws of the State of Massachusetts; Middletown Beef and Provision Company, a corporation organized and existing under the Laws of the State of Massachusetts; Glenn & Anderson Co., a corporation organized and existing under the Laws of the State of Illinois.

WILSON DEFENDANTS

Corporations

Wilson & Co., a corporation organized and existing under the Laws of the State of New Jersey; Wilson & Co., Inc., of Calif., a corporation organized and existing under the Laws of the State of Nevada; Wilson and Co., Inc., of Louisiana, a corporation organized and existing under the Laws of the State of Louisiana; Wilson & Co., Inc., of Okla., a corporation organized and existing under the Laws of the State of Oklahoma; South Dakota Provision Co., a

corporation organized and existing under the Laws of the State of South Dakota; Gotham Hotel Supply Co., Inc., a corporation organized and existing under the Laws of the State of New York; Standard Beef Co., a corporation organized and existing under the Laws of the State of New York; Stiefel-O'Mara Co., Inc., a corporation organized and existing under the Laws of the State of New York; Drexel Packing Co., a corporation organized and existing under the Laws of the State of Illinois; Albert Lea Packing Co., Inc., a corporation organized and existing under the Laws of the State of Virginia; Mississippi Packing Co., Inc., a corporation organized and existing under the Laws of the State of Virginia; Morton-Gregson Co., a corporation organized and existing under the Laws of the State of Delaware; Paul O. Reymann Co., a corporation organized and existing under the Laws of the State of West Virginia; Standard Provision Co., a corporation organized and existing under the Laws of the State of New Jersey; Central Products Corporation, a corporation organized and existing under the Laws of the State of Virginia.

CUDAHY DEFENDANTS

Corporations

Cudahy Packing Company of Nebraska, a corporation organized and existing under the Laws of the State of Nebraska; Cudahy Packing Company of Alabama, a corporation organized and existing under the Laws of the State of Alabama; Cudahy Packing Company of Louisiana, Ltd., a corporation organized and existing under the Laws of the State of Louisiana; Nagle Packing Company, a corporation organized and existing under the Laws of the State of New Jersey.

OTHER DEFENDANTS

Corporations

Western Meat Company, a corporation organized and existing under the Laws of the State of California; Oakland Meat and Packing Company, a corporation organized and existing under the Laws of the State of California; Nevada Packing Company, a corporation organized and existing under the Laws of the State of Nevada.

These corporations are hereinafter referred to as the subsidiaries defendants.

ARMOUR DEFENDANTS

Individuals

J. Ogden Armour, Charles W. Armour, A. Watson Armour, Laurence H. Armour, Arthur Meeker, Robert J. Dunham, F. Edson White, George M. Willetts, Frederick W. Croll, George B. Robbins.

SWIFT DEFENDANTS

Individuals

Louis F. Swift, Edward F. Swift, Charles H. Swift, Gustavus F. Swift, Jr., Harold H. Swift, Alden B. Swift, George H. Swift, Laurence A. Carton, Frank S. Hayward, Charles A. Peacock, Wilfred W. Sherman, Wellington Leavitt, John M. Chaplin, William B. Traynor.

MORRIS DEFENDANTS

Individuals

Edward Morris, Nelson Morris, Louis H. Heymann, Charles M. Macfarlane, Harry A. Timmins.

WILSON DEFENDANTS

Individuals

Thomas E. Wilson, Arthur Lowenstein, Jacob Moog, Vonce De Leon Skipworth, Arthur L. Smith, James A. Hamilton, George D. Hopkins, Adolph E. Peterson, George H. Cowan, William C. Buethe, Carl F. Burrell, James C. Good.

CUDAHY DEFENDANTS

Individuals

Edward A. Cudahy, Sr., Edward A. Cudahy, Jr., Guy C. Shephard, John E. Wagner, Andrew A. Anderson, Emil A. Strauss, Frank E. Wilhelm, George Marples.

OTHER DEFENDANTS

Individuals

Fred L. Washburn.

These defendants are herinafter referred to as the individual defendants.

COURT'S JURISDICTION

The parent companies, either directly or through subsidiaries, are engaged in interstate and foreign commerce in (a) the purchase and slaughter of live stock, (b) the preparation and manufacture of dressed meats and edible by-products of the slaughter, (c) the curing, canning, or otherwise perparing for the market of the edible products and by-products of the slaughtered animal, (d) the production and sale of non-edible by-products and of articles in the manufacture of which these non-edible products are largely used, (e) the manufacture, canning, or otherwise preparing for the market, sale and distribution of food

supplies other than meats (these are hereafter referred to as substitutes for meat foods), (4) the manufacture and sale of various other articles commonly purchased and used either by the producer of live stock, the companies transporting the live stock or dressed meats or the competitors of the parent companies (these are hereinafter referred to as unrelated commodities).

By the unlawful means and methods hereinafter set out and complained of, the parent companies and the subsidiaries, defendants, acting by and through their principal officers, who have been made defendants herein, have attempted to dominate, control and monopolize a very great proportion of the food supply of the nation and have thereby built up an unlawful monopoly and control over divers and sundry products and commodities herein referred to, and which are necessary to the life, health and welfare of the people of the United States. And by the same or similar methods the said parent companies and the subsidiaries defendants are attempting to increase and extend said monopoly, and are enabled thereby and do artificially control the supply and the price of the food supplies of the nation.

The Government in instituting this proceeding invokes the general equity powers of this Court in addition to the authority conferred upon it and contained in the Act of Congress dated July 2nd, 1890, and entitled "An Act to Protect Trade and Commerce against unlawful restraints and monopolies," said act being commonly known as the Sherman Anti-Trust Law, and further conferred and contained in acts amendatory thereof and supplemental or additional thereto, and particularly the act known as the Clayton Anti-Trust Act dated October 15, 1914, being entitled "An Act to Supplement Existing Laws against Unlawful Restraints and Monopolies and for Other Purposes," which

said acts by special provisions give to this Court jurisdiction in all such matters as are set out in the following petition.

OBJECT TO BE ATTAINED

This petition is filed and these proceedings are instituted to put an end to any and all monoplies which the defendants may have created or obtained in the interstate trade or commerce of live stock, meat products and substitute foods, and to prevent the continuance of unlawful monopolies by the defendants, in the aforesaid trade or commerce in the products and commodities so described, and to deprive said defendants of certain instrumentalities, facilities and advantages by which they have been enabled heretofore to more effectively perfect their attempts to monopolize; to compel the defendants to desist from dealing in certain of the substitute foods, and certain of the unrelated commodities; to limit, in the manner hereinafter set forth, the interests which the individual defendants may have in corporations handling certain substitute foods and unrelated commodities; and to dissolve any and all contracts, combinations and conspiracies in restraint of trade or commerce between the several states, which contracts, combinations or conspiracies are more fully hereinafter described and to prevent said defendants from maintaining said contracts, combinations or conspiracies with each other, or from entering into further contracts, combinations or conspiracies with each other or with other persons.

THE NATURE OF THE BUSINESS AND METHOD BY WHICH IT IS CONDUCTED

The principal business of each of the parent companies, conducted by each company directly or through its subsidiaries, is the slaughter of live stock, consisting of cattle,

hogs, sheep and calves, the dressing of the carcasses and the distribution of the dressed meat in interstate commerce through various means by which the dressed meat reaches the retail butchers and is by the retail butchers sold to the consumers.

Each of these concerns is the successor or natural outgrowth of concerns of many years' standing. In their inception these concerns devoted themselves exclusively to the slaughter of live stock, the dressing of the carcass and the sale of the dressed meat to retail butchers or consumers. The invention of what are known as route cars and refrigerator cars, by means of which the dressed meats might be hauled long distances and preserved for a considerable length of time, free from decay, enabled the parent companies to widely extend their market so as to make it nationwide, and further enabled them to slaughter the live stock near the source of supply.

As the demand for live stock grew in volume the institution known as the stockyard was evolved.

THE STOCKYARDS

The stockyard was and is in theory a public market place to which all who wish to either buy or sell may have free access and right to trade. The stockyards afford to the cattle raiser the opportunity to dispose of his live stock for an immediate cash price. Contiguous to such stockyards commission men, dealing exclusively in the sale of live stock, locate themselves. These commission men attend to the care of the live stock upon its arrival, effect the sale of the stock so consigned, attend to its weighing, collect the proceeds of the sale and remit to the consignor after deducting customary commission.

Stockyards render certain services to the shipper, for which they make charge, to wit, yardage (furnishing the

facilities and performing the services of placing and keeping the animals in pens and watering them), feeding, and selling food, weighing, dipping, bedding cars and often loading and reloading.

The yardage charges are ordinarily based upon an arbitrary price per head for each kind of stock, but in some instances they are based upon the hundredweight. The charge for feed is fixed by the stockyards and includes the services rendered in feeding. The amount of the charges made or to be made for the other items of services or materials furnished is also fixed by the stockyards or those who are in control of the yards.

In connection with each stockyard there is need for certain facilities and conveniences for the benefit of either the shipper or the buyer of the live stock. The stockyards, by reason of its dominating position, control these conveniences and facilities.

CONVENIENCES AND FACILITIES CONTROLLED BY STOCKYARDS

Packing House Sites

In furtherance of the tendency to centralize the market, it became of advantage to establish the slaughter houses and packing plants either in, or immediately adjacent to, the stockyards. The stockyard companies generally own or control all the available land within the yards, and at most of the important yards the land surrounding the yards is owned by companies controlled by the stockyard company or its principal stockholders. New packing companies as a rule can secure desirable packing sites only from the stockyard companies or from these land development companies. The owners of stockyard companies are, therefore, in a position to determine what packing companies and how many plants shall be established at the yards.

Sites for Stockyard Banks and Cattle Loan Companies

The cattle-raiser is in many instances dependent upon banks or loan companies to finance him in the rearing of his live stock and until such times as the stock shall have been sold. From the nature of the business it is a great advantage to these banks to locate in or near stockyards. It, therefore, lies within the power of the owner of the stockyard companies to designate how many and which banks or loan companies may establish themselves at the yards.

Rendering Plants

While in transit or after reaching the yards, livestock often die either from disease or accident. The stockyard companies, by virtue of their agreement with the commission men, are permitted to determine who shall buy the dead animals and the price which shall be paid therefor. This monopoly power has generally resulted in the establishment of only one dead rendering plant at each of the important yards.

Commission Men's Office Space

The commission men and traders at the stockyards must have offices in or near the yards. They can get such accommodation only from renting or leasing from the stockyard companies. For the purpose of furnishing such office space, each yard has a large building or series of buildings, in which offices are leased to the commission men. The commission men are alloted pens, and inasmuch as it is of great advantage to commission men to be able to dispose of his customer's live stock at the earliest possible hour, location of pens most favorable to the prospective buyer is of great advantage.

Terminal Railways

The centralization of the market at one site and the resultant growth of the packing houses in or about the market, of necessity, require terminal railways to facilitate the switching of cars from the railroads to the stockyards, from the yards to the packing plants, and from the packing plants to the railroads. These terminal or stockyard railways are usually owned by the stockyard companies or by those in control of the stockyard companies. Control of these railways carries with it the power to grant or withhold sidings, spurs or other accommodations which may be required by packing houses, and those in control of said terminal railways are thereby in a position to discriminate against other packers or independent buyers by practicing delay in loading the animals bought by said packers or independent buyers and in switching the loaded cars to the connecting lines.

Market Papers and Journals

In addition to having a free market in which to dispose of his live stock, the cattle raiser requires full, accurate and unbiased reports of the demand for live stock, the prices prevailing and the character and kind of stock required, together with such other information as to market or trade conditions. The cattle raiser, of necessity, is located at places remote from the market, he rarely accompanies his shipment to the market, and by reason of the cost of shipment and of feeding in transit and while being held for sale, it is imperative that he dispose of his stock when once he has shipped. For his guidance the cattle-raiser relies largely upon the trade papers and journals. Control of these papers and journals furnishes a means whereby the flow of stock to the market may be increased or decreased to the benefit of the slaughterer.

It is, therefore, evident that control of the stockyards and of the other facilities appertaining to the stockyards carries with it:

(a) A profit derived from the meat industry levied upon it and collected before the animal is slaughtered, all of which profit, however, evidences itself in the ultimate cost which the consuming public must pay for the dressed meat.

(b) A potential means of favoritism in dealing with commission men and of influence over them, a power to grant monopolities—carrying with it consequent profit—to banks, cattle loan institutions, rendering plants, to concerns supplying food for live stock and to others.

(c) A means to prevent the establishment of new packing plants and to hamper the growth of those in existence.

(d) A means to prevent the development, and limit the number, of new markets and to centralize and restrict business to the stockyards so controlled.

(e) Peculiar and exclusive access to information concerning the receipts and sale of live stock, its disposition and the dissemination of information to the producer.

BRANCH HOUSES, ROUTE CARS, AUTO TRUCKS AND COLD STORAGE WAREHOUSES

Branch Houses

The primary means adopted by the parent companies in the distribution of their dressed meats are the branch houses. These houses are storage stations located in the cities and larger towns. They are equipped with facilities for cooling and preserving the meats and each is under the charge of a branch house manager, under whose direction the branch house sales organization sells to retail and wholesale butchers, to purveyors, hotels, restaurants and other similar larg consumers. The parent companies main-

tain 1120 branch houses in various large towns and cities throughout the United States, as against which all other interstate slaughterers, independent of the parent companies, maintain only 139.

Route Cars

The route cars supplement the branch houses. They serve the purpose of reaching these small communities where the trade is not sufficiently large to justify investment in a branch house. These route cars travel over what are known as car routes. Orders are taken in advance and the route cars reaching specified towns on specified dates serve the requirements of the smaller communities. The starting point for the route cars is usually the packing plant, though in some instances the route car starts from a branch house. The parent companies operated as of June, 1918, 1297 route cars, which constituted 90% of the total number operated in the packing industry. Said route cars reach and serve dealers in 37,176 towns, and operate in 37 of the states of the United States.

Auto Trucks

This is a further development of the route car plan. It had its origin in the development of the motor truck and because of its freedom from railway limitations and schedules, it is enabled to reach a wider radius and smaller towns than is the route car.

The auto trucks have been adopted primarily by Armour & Company as a supplement to the car routes. These auto trucks reach and serve a total of 20,836 towns throughout the United States.

Cold Storage Warehouses

The cold storage warehouses were in the beginning adopted as an instrumentality for enabling the parent

companies to extend the volume of their slaughter of live stock and sale of dressed meat. In the first instance they were used for chilling meat in connection with the packing business. Then they were constructed in connection with the branch houses, so that they might be used for storing and holding the finished meats until they were sold. Later they were either built or acquired in the large eastern seaboard cities for long time storage and for storing for export. As will be more fully set forth hereafter in discussing the control of substitute foods, these storage warehouses were later employed to store non-meat food products. Later control was acquired over public storage warehouses where surplus space was leased or let to others. Later it will be pointed out how control of this public storage warehouse was employed to aid in control of the price of meats and substitute foods.

THE PARENT COMPANIES' ACQUISITION OF ABOVE DESCRIBED FACILITIES AND THEIR PURPOSE IN DOING SO

The parent companies and their controlling heads, appreciating the advantages which were to be gained by controlling the stockyards and the facilities pertaining thereto, the terminal railways and market papers and trade journals, and realizing that the requisition of such instrumentalities might thus enable them to obtain a primary profit not only out of the sale of live stock purchased and slaughtered by them, but also on that purchased and slaughtered by their competitors, and realizing the opportunities thereby to repress and discourage the development of independent packers and slaughter houses and to control the shipments of meat to the various markets, set about the acquisition of the various stockyards and the appurtenances and privileges incidental thereto. This in many instances was done by a concert of action and pursuant to

a common understanding. In most instances the acquisition of control of the aforesaid stockyards by any one or more of the parent companies was acquiesced in by the others and in all instances the ownership or control of stockyards by other packers or by any one in fact other than the parent companies or one of their members, or their controlling heads, was discouraged and opposed.

In pursuance of a common purpose, plan and design, outside investors and independent packers have gradually been forced out as dominating factors both in the ownership and management of most of the important stockyards and have been replaced by the parent companies or their representatives. This acquisition has been accomplished by various methods: In the earlier years by exacting stock donations under threats of moving away their packing plants, later by cash subscriptions for stock, generally below par, and in other instances by voluntary reorganization of stockyard companies in order that the parent companies and their controlling heads might gain a controlling or dominating power in the yards and thus be induced to continue to maintain their packing plants thereat. By these various means the parent companies directly, or indirectly through their controlling heads, have been enabled to obtain control of substantially all of the large stockyards of the country. They now have, either jointly or separately, a controlling interest in 22 of the 50 market stockyards in the United States.

The parent companies have availed themselves of the control so acquired by them in the stockyards aforesaid to elect the officers and directors of said stockyards and to dominate and control the policies thereof. They have granted exclusive privileges, such as the right to purchase dead animals, the right to furnish supplies and facilities and the location of cattle banks and cattle loan companies,

to concerns and corporations in which they or some of them or individuals who are stockholders in said parent companies, hold the controlling stock, and they have otherwise, acting in concert, employed the powers and privileges more specifically set forth and discussed under the heading "Nature of the Business and Method by Which It Is Conducted"; all of which has been done with the intent and purpose of, and has had the effect of discouraging and suppressing the establishment of independent packing establishments and dwarfing the growth of such independent packing companies as might then be in existence, and to enable said parent companies, their subsidiaries or the individuals who own and control the parent companies and their subsidiaries to obtain vast profits from the management of the stockyard and the granting of the privileges appurtenant thereto; which profits are realized not only upon the live stock purchased by the packers, but upon that purchased by their competitors. These methods have thus enabled them to enjoy and realize such profits without the same appearing or being disclosed in the profits of the parent companies; they have also furthered the attempt of said parent companies to monopolize the meat industry of the country and to artificially control the ultimate price which the consumer pays for meat and meat products.

CONTRACTS IN RESTRAINT OF TRADE

The parent companies have entered into certain unlawful contracts and combinations to restrain trade and commerce and to artificially prevent between themselves competition in the prices for which meat and meat products are sold.

The most important of said contracts and agreements is what is known as the percentage purchase arrangement. This arrangement, though applied primarily in the purchase

of live stock had as its ultimate object the elimination of competition, not only in the purchase of live stock but also in the sale of dressed meats. It is a well established commercial principle that a limitation upon the source of supply and the consequent limitation upon volume of business are the easiest means of removing all incentive to reduce prices.

The simplest way to limit the volume of dressed meat is to limit the purchase of live stock.

Recognizing these principles, the parent companies thereupon agreed upon and thereafter recognized between themselves certain percentages or proportions to which they deemed that each company was entitled, and they thereafter so gauged their purchases that annually their respective purchases approximated actually or substantially the percentages so agreed upon.

As a means of perfecting this arrangement, divers percentages varying at different stockyards were agreed upon, and understandings were had that certain of the parent companies should buy in certain yards or should refrain from buying in certain stockyards. In order to prevent such plans from being disarranged by outsiders, agreements were made with such outsiders by which purchases between the parent companies and the independents were effected upon a percentage basis similar to the above.

Means were adopted and, by virtue of the parent companies' control over many of the stockyards, were easily executed, by which sales to outsiders or independents were controlled by the parent companies.

Control over the stockyards, the stockyards loan institutions, the terminal railways and other privileges and

perquisites has discouraged any opposition by either commission men or independent packers.

CONTROL OF SUBSTITUTE FOODS

Having eliminated competition in the meat products, the defendants next took cognizance of the competition which might be expected from what we here refer to as substitute foods. Their experience had taught them that if meat prices advanced out of proportion to that of other substitute foods, the consuming public manifested a tendency to turn to such substitutes. To prevent this the defendants set about controlling the nation's supplies of fish, vegetables, either fresh or canned, fruits, cereals, milk, poultry, butter, eggs, cheese and other substitute foods ordinarily handled by wholesale grocers or produce dealers. To accomplish this purpose, the defendants availed themselves of the advantages afforded by the refrigerator cars, route cars, auto trucks, branch houses and storage warehouses owned or controlled by them. These facilities intended primarily for the sale of meats were employed with comparatively no increase of overhead in the distribution of the substitute foods and unrelated commodities. The defendants were enabled thereby to reach remote spots. This advantage was also employed temporarily to fix prices so low as to gradually eliminate competition.

These attempts to monopolize have resulted in complete control in many of the substitute food lines. They have made substantial headway in others. The control is extensively and rapidly increasing. New fields are gradually being invaded and unless prevented by a decree of this court, the defendants will, within the compass of a few years, control the quantity and price of each article of food found on the American table.

EXTENT TO WHICH THE MONOPOLISTIC ATTEMPTS HAVE BEEN SUCCESSFUL

Financial Growth, Present Net Worth and Volume of Business

In the fifteen years from 1904 to 1919, Swift & Company, Armour and Company, Wilson & Co., Inc., and The Cudahy Packing Company, according to their financial reports, grew from a net worth of approximately $92,000,000 to a net worth of approximately $479,000,000, and in this same period they paid in cash dividends $105,000,000. Only $89,000,000 of their increased worth represented new capital. Though always asserting a very low rate of profit on sales, the five parent companies have grown so rapidly that their combined net profits for 1917 have equaled nearly the amount of their total net worth in 1904. Sales in fifteen years have increased until, for the fiscal year 1918 they reached the vast sum of three billion two hundred million dollars. This was realized from meats, substitute foods and unrelated lines as hereinabove set forth. In stating these figures account has been taken only of the profits and sales of the parent companies and subsidiaries included by them upon their books. No account has been taken of the many corporations which are owned or controlled by the same family or financial interest as own or control the parent companies.

In addition to these profits there have been other vast profits, difficult of ascertainment, realized by the individuals by virtue of either their personal control of other packing houses and slaughtering companies or their interest in stockyards, terminal railways, rendering companies, cattle loan institutions and banks and other corporations, all of which corporations have their inception and depend for their prosperity upon advantages or privileges growing out of the interlocking control of the stockyard and stock yard appurtenances.

Number of Controlled Companies

The parent companies or the individual defendants and their families maintain and control 574 corporations or concerns, including 131 trade names. They have a significant minority stock interest in 95 others and an interest of unknown extent in an additional 93. Thus the total number of concerns in which they have control or interest is some 762. In the years that are past the parent companies have acquired or organized many other concerns and have maintained them so long as they were useful for their purposes. When no longer useful those concerns, so acquired or organized, have been dissolved and their businesses have been merged into that of the parent companies or that of other subsidiaries. Such dissolved corporations and concerns are omitted in the above compilation except in those instances where their names have been continued as trade names. The total of 762 above stated, therefore, falls far short of representing the number of concerns that corporate and individual defendants have acquired or have organized in furtherance of the general scheme and plan of action already explained.

Extent of Industrial Control in the Substitute Foods and Unrelated Commodities

It would be an enormous undertaking to determine the degree of control exercised by the defendants in all of these various industries. Enough has been ascertained to indicate that the growth has been rapid and that if permitted to continue unchecked, in a matter of a few years the control will be complete.

In 1916 the business of Armour and Company in canned fish, vegetables and sundries, canned and dried fruits, fruit preserves (soda fountain supplies) and grape juice amounted to $6,396,036.73; in 1918, two years later, the

same company's volume of business in these same items was $39,820,000, over a six-fold increase. While part of this increase of business may be attributed to the increase of population and the consequent increase of consumption, the greater part thereof was acquired at the expense of competitors. Of the corporations which have been acquired by the parent companies in recent years, a large number are concerns manufacturing or selling these substitute foods or unrelated commodities. This fact, together with the increased activities of the parent organizations, themselves, in these lines indicates a well defined purpose on their part to secure control of the market for meat substitute foods. In addition to the companies whose control has been acquired by outright purchase, the parent companies have, in a large number of instances, contracted for the exclusive output of many other companies engaged in the production of the substitute foods and the unrelated commodities. The outputs of these plants are marketed by the parent companies or by their subsidiaries through the distribution facilities of the parent companies. In this fashion the parent companies control the output of these concerns and the market price of their products as completely as though they themselves owned the producing companies.

INDIVIDUAL DEFENDANTS

The individual defendants are either officers, directors, agents or employees of the parent companies or their subsidiaries or large stockholders of parent companies and subsidiaries who are otherwise affiliated in commercial operations with the active heads of the parent companies. These individual defendants are in their individual capacity financially interested to a great extent in the stockyards, terminal railways, cattle loan banks, rendering companies and other institutions interrelated with the stockyards. They, or some of them, control the corporations

dealing in the substitute foods and the unrelated commodities. In many instances, in addition to their individual holdings, they hold stock in these corporations for the benefit of the parent companies. The control by these individuals of the facilities or instrumentalities of the meat business and their interest in concerns dealing in the substitute foods and the unrelated commodities, enable the parent companies to carry out the purpose of the combinations hereinabove described and are now and will continue to be a sinister and ever present means of furthering the attempt to monopolize and perfect it to such a degree, that the parent companies or their subsidiaries will have complete control, not only of meat products, but of all substitute foods consumed in the United States.

SUBSIDIARIES DEFENDANTS

These comprise many, but not all, of the subsidiaries owned or controlled by the parent companies. Only these subsidiaries, which are substantially 100% parent company owned and which are engaged either in the slaughtering, packing or selling of meats, have been made parties defendant. It is the plan and scheme of this petition and the prayer for relief that the corporations which in themselves own the facilities more specifically described above or deal in the substitute foods and unrelated commodities, shall not be made parties defendants in the first instance or until it appears that they are necessary parties defendants, but that the parent companies, the subsidiaries defendants and the individuals should be compelled to divest themselves of all interest in or connection with the subsidiaries owning the facilities or dealing in the substitute foods or commodities referred to.

PRAYER

WHEREFORE, petitioner prays.

I. That the defendants and each of them be forever enjoined from continuing any contract, combination or con-

spiracy in restraint of trade or commerce in the purchase of live stock, or the purchase, sale or distribution of dressed meats or other products or commodities now handled by them or any of them among the several states or foreign nations, which contract, combination or conspiracy may now exist between them, or any two or more of them, or from doing any act pursuant to or in furtherance of any such contract, combination or conspiracy, and that they be enjoined from entering into any other or further contract, combination or conspiracy either among themselves or among any two or more of them or with any other person or persons whatsoever, in restraint of trade or commerce between the several states and foreign nations.

II. That they and each of them be enjoined and forever restrained from monopolizing, or attempting to monopolize, or conspiring to monopolize, the trade or commerce between the several states or with foreign states in the purchase, sale or distribution of live stock or the commodities aforesaid.

III. That the defendants and each of them be required to divest themselves to such extent and upon such terms and conditions as the Court may deem proper from such interest in or control over public cold storage warehouses, retail meat markets, stockyards, terminal railways, market or trade journals or such other facilities as are connected with or are appurtenances to the stockyards, in such instances as the Court may deem that such instrumentalities constitute a means of facilitating the formation or continuance of monopolies in the purchase of live stock or the sale of the commodities aforesaid.

IV. That the corporation defendants and each of them be perpetually enjoined from permitting their refrigerator cars, route cars, auto trucks or branch houses, or other

distributive facilities to be used for the distribution or sale of commodities of the character and kind hereinbefore generally described as substitute foods and unrelated commodities, in such instances and to such extent as the Court may deem necessary for the purpose of preventing the aforesaid defendants from acquiring a monopolistic control over the trade or commerce in such commodities, or a control which may enable them to restrain the trade or commerce or artificially affect the price of any commodities in which the aforesaid defendants now deal.

V. That the defendants and each of them be required to divest themselves of all stockholdings or other interests in any corporation, partnership or association now dealing in any of the food substitutes or unrelated commodities hereinbefore more specifically described, and that wherever said defendants own, operate or control a department buying, selling or otherwise distributing substitute foods, unrelated commodities, or any of them, that they be required to discontinue the aforesaid department, and that the defendants and each of them be restrained and perpetually enjoined from hereafter acquiring any stockholdings or interests of the character hereinbefore described, in any corporation dealing exclusively or partially in the said substitute foods or commodities hereinbefore referred to, or from themselves engaging in such business, either directly or through a department.

VI. That the defendants and each and every one of them be perpetually enjoined from indulging in any unlawful practice or committing any act of unfair competition or any other act with the purpose of or which may have the effect of unduly restraining trade and commerce, or which may be indulged in or done with the purpose or effect of monopolizing said trade or commerce in the

commodities now manufactured, bought, sold or otherwise dealt in by the defendants or any one of them.

VII. That your petitioner be granted such other and further relief as the nature of the case may require and the Court may deem just and proper in the premises.

To the end, therefore, that the United States may obtain the relief to which it is justly entitled in the premises, may it please Your Honors to grant writs of subpœna directed to each and every one of said defendants, commanding them and each of them to appear herein and answer, but not under oath (answers under oath being hereby expressly waived), the allegations contained in the foregoing petition, and to abide by and perform such order or decree as the Court may make in the premises, and upon final hearing hereof to permanently enjoin each of the defendants as hereinbefore prayed.

Respectfully submitted,

JOHN E. LASKEY
United States Attorney.

A. MITCHELL PALMER,
Attorney General.

ISIDOR J. KRESEL,
JOHN H. ATWOOD,
JOSEPH SAPINSKY,
Special Assistantants to the Attorney General.

Consent Decree,

February 27, 1920

In the Supreme Court of the District of Columbia

THE UNITED STATES OF AMERICA,
Petitioner,

v.

SWIFT AND COMPANY AND OTHERS,
Defendants.

37623
Equity

This cause having come on to be heard on this 27th day of February, in the year 1920, before the Hon. Walter I. McCoy, Chief Justice, and the petitioner having appeared by the Honorable A. Mitchell Palmer, Attorney General of the United States, by its District Attorney, John E. Laskey and by Isidor J. Kresel, John H. Atwood, and Joseph Sapinsky, Special Assistants to the Attorney General, thereto duly authorized, and having moved the court for an injunction in accordance with the prayer of its petition; and it appearing to the court that the allegations of the petitioner state a cause of action against the defendants under the provisions of the act of July 2, 1890, entitled, "An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies," and acts amendatory thereof and supplemental or additional thereto, and that the court has jurisdiction of the persons and the subject matter; and the several defendants having accepted service of process and having appeared and filed answers to the petition, which answers are on file in the office of the clerk of this court; and the parties having this day entered into a stipulation in this action, which stipulation is on file in the office of the clerk of this court, and from which it appears, among other things, that while the defendants, and each of them, main-

tain the truth of their answers and assert their innocence of any violation of law in fact or intent, they nevertheless, desiring to avoid every appearance of placing themselves in a position of antagonism to the Government, have consented and do consent to the making and entry of the decree now about to be entered without any findings of fact, upon condition that their consents to the entry of said decree shall not constitute or be considered an admission, and the rendition or entry of said decree, or the decree itself, shall not constitute or be considered an adjudication that the defendants or any of them have in fact violated any law of the United States.

Now upon the petition, the answers of the defendants, and the aforementioned stipulation and consents of the parties, all on file in the office of the clerk of this court, and on motion of the petitioner, it is ordered, adjudged, and decreed as follows:

First. That the corporation defendants and each of them be, and they are hereby, jointly and severally perpetually enjoined and restrained from, either directly or indirectly, by themselves or through their officers, directors, agents, or servants, in any manner maintaining or entering into any contract, combination, or conspiracy with each other, or with any other person or persons, in restraint of trade or commerce among the several States, or from either directly or indirectly, by themselves or through their officers, directors, agents, or servants, either jointly or severally monopolizing or attempting to monopolize or combining or conspiring with each other, or with any other person or persons, to monopolize any part of such trade or commerce.

Second. That the defendants and each of them be, and they are hereby, jointly and severally perpetually enjoined

and restrained from owning, either directly or indirectly, individually or by themselves, or through their officers, directors, agents or servants, any capital stock or other interest whatsoever in any public stockyard market company in the United States, or in any stockyard terminal railroad in the United States, or in any stockyard market newspaper or stockyard market journal published in the United States, except in so far as the court may permit any of the individual defendants to retain any such interests upon the conditions and in such circumstances as are provided for in paragraph tenth of this decree; and said defendants and each of them are hereby further enjoined and restrained from accepting or permitting to be given, directly or indirectly, on any pretext whatever, to any of them, or to any of their officers, directors, servants or employees, for the use and benefit of the corporation defendants or any of them, any capital stock or other interest in any public stockyard market company, stockyard terminal railroad, or stockyard market newspaper or stockyard market journal.

Third. That the corporation defendants and each of them and their successors and assigns be, and they are hereby, perpetually enjoined and restrained from, either directly or indirectly, by themselves or through their officers, directors, agents or servants, through any device or arrangement whatsoever, using or permitting any other person, firm or corporation to use their distributive system and facilities, including their branch houses, route cars and auto trucks, or any of them, in any manner for the purchase, sale, handling, transporting, distributing or otherwise dealing in any of the articles or commodities named and described in paragraph Fourth of this decree, except in so far as permitted in said paragraph Fourth, and except refrigerator cars when in good faith leased to

common carriers, or furnished to them for their use as common carriers.

The corporation defendants or any of them may from time to time lease, sell or otherwise dispose of any of the items of their distributive system free from any of the restrictions of this decree when they have a surplusage thereof or when such items have become obsolete or are otherwise not required for the business of the defendants or any of them. But no sale, lease or other disposition of a substantial part of defendants' respective distributive systems or such distributive system as an entirety shall be made without submitting the same to the court for the court's investigation and determination as to whether said proposed sale, lease, or other disposition is in accordance with the spirit and purpose of this decree, and without notice of the application for such approval first given to the Attorney General. Nothing herein contained shall be construed to prohibit the defendants or any of them from mortgaging or otherwise creating liens on said distributive system or parts thereof.

Fourth. That the corporation defendants and each of them be, and they are hereby, perpetually enjoined and restrained from, in the United States, either directly or indirectly, by themselves or through their officers, directors, agents, or servants, engaging in or carrying on, either by concert of action or otherwise, either for domestic trade or for export trade, the manufacturing, jobbing, selling, transporting, (except as common carriers) distributing, or otherwise dealing in any of the following products or commodities, except when such products or commodities are purchased, transported, or used (1) as supplies in operating their packing houses, branch houses, or other facilities used by them, or as an incident in the processes of manufacturing soap or packing-house prod-

ucts; (2) in the construction and physical maintenance of their packing houses, branch houses, or other facilities used by them; (3) in the operation of their restaurants, laundries, or other conveniences, primarily for the benefit of their employees; or (4) in combination with meat, to wit:

1. Fresh, canned, dried or salted fish, including therein, but in nowise limiting the foregoing general description, the following to wit:

Canned oysters.	Canned salmon.
Canned mackerel.	Canned sardines.
Bulk mackerel.	Canned shrimp.
Bulk, canned, and cured herring.	Canned tuna fish.

2. Fresh, dried, or canned vegetables, except in combination with meats, including therein, but in nowise limiting the foregoing general description, the following, to wit:

Asparagus.	Potatoes.
Navy beans.	Tomatoes.
Lima beans.	Celery.
Peas.	Garlic.
Beets.	Horse-radish.
Corn.	Pumpkins.
Okra.	

3. Fresh, crushed, dried, evaporated, or canned fruits, including therein, but in nowise limiting the foregoing general description, the following, but not including the same when used as an ingredient of mincemeat, to wit:

Ginger.	Figs.
Cherries.	Gooseberries.
Apple butter.	Oranges.

Apricots.
Blackberries.
Peaches.
Pineapple.
Raspberries.
Currants.
Strawberries.
Apples.
Prunes.
Raisins.
Dates.

4. Confectionery, sirups, soda-fountain supplies and sirups and soft drinks (grape juice is not included in this paragraph 4; see paragraph 14), including therein, but in nowise limiting the foregoing general description, the following, to wit:

Apple cider.
Cherry juice.
Coca Cola.
Creme de menthe.
Crushed nut frappe.
Ginger ale.
Green pineapple sirup.
Lemon extract.
Marshmallow topping.
Orange extract.
Root beer.
Vanilla extract.
Vin fiz.

5. Molasses, honey, jams, jellies, and preserves of all kinds.

6. Spices, sauces, condiments, relishes, and sauerkraut, including therein, but in nowise limiting the foregoing general description, the following, to wit:

Catsup.
Chilli sauce.
Cinnamon.
Cloves.
Mustard.
Mustard seed.
Olives.
Oyster cocktail sauce.
Pepper.
Pickles.
Spinace chilli.
Tomato catsup.

7. Coffee, tea, chocolate, and cocoa.

8. Nuts, including therein the following, to wit:

Almonds.	Walnuts.
Pecans.	

But not including peanuts.

9. Flour, sugar, and rice.

10. Bread, wafers, crackers, biscuits.

11. Cereals, including therein, but in no wise limiting the foregoing general description, the following, to-wit:

Grits.	Ground corn.
Oats.	Cracked corn.
Hominy.	Crushed white oats.
Hominy feed.	Feed barley.
Horse feed.	Feed meal.
Brewers' flakes.	Feed wheat.
Brewers' grit.	Rolled oats.
Brewers' meal.	Standard middlings.
Buckwheat.	Standard spring brand.
Canned hominy.	Spaghetti.
Clipped oats.	Vermicelli.
Corn grits.	Macaroni.
Ground meal.	Corn flakes.
Ground oats.	Wheat foods.

12. Grain.

13. Miscellaneous articles, to wit:

Cigars.	Cement, lime, plaster.
China.	Doors and windows.
Furniture.	Dried brewers' grains.
Bluing, starch.	Lath.
Fence posts and wire fences.	Pitting and fruit handling machinery.
Alfalfa meal.	

Babbitt.
Bar iron.
Binding and twine.
Brass castings for heavy ordnance.
Brick.
Builders' hardware.
Bumping posts for railroads.
Roofing.
Sand and gravel.
Shingles.
Soda fountains or parts thereof.
Structural steel.
Tile.
Waste.

14. Grape juice.

And the corporation defendants and each of them be, and they are hereby, further perpetually enjoined and restrained from owning, either directly or indirectly, severally or jointly, by themselves or through their officers, directors, agents, or servants any capital stock or other interest whatsoever in any corporation, firm, or association except common carriers, which is in the business, in the United States, of manufacturing, jobbing, selling, transporting, except as common carriers, distributing, or otherwise dealing in any of the above-described products or commodities.

Fifth. That the individual defendants, and each of them, be, and they are hereby, perpetually enjoined and restrained from, in the United States, either directly or indirectly, by themselves or through their agents, servants, or employees, owning voting stock which in the aggregate amounts to fifty per cent or more of the voting stock of any corporation, except common carriers, or any interest in such corporation resulting in a voting power amounting to fifty per cent or more of the total voting power of such corporation, or which interest by any device gives to any such defendant or defendants a voting power of fifty per cent or more in any such corporation, or a half interest or more in any firm or association which corporation, firm,

or association may be, in the United States, in the business of manufacturing, jobbing, selling, transporting, distributing, or otherwise dealing in any of the following products or commodities, to wit:

1. Fresh, canned, dried, or salted fish, including therein, but in nowise limiting the foregoing general description, the following, to wit:

Canned oysters.	Canned salmon.
Canned mackerel.	Canned sardines.
Bulk mackerel.	Canned shrimp.
Bulk, canned, and cured herring.	Canned tuna fish.

2. Fresh, dried, or canned vegetables, except in combination with meats, including therein, but in nowise limiting the foregoing general description, the following, to wit:

Asparagus.	Potatoes.
Navy beans.	Tomatoes.
Lima beans.	Celery.
Peas.	Garlic.
Beets.	Horse radish.
Corn.	Pumpkins.
Okra.	

3. Fresh, crushed, dried, evaporated, or canned fruits, including therein, but in nowise limiting the foregoing general description, the following, but not including the same when used as an ingredient of mince meat to wit:

Ginger.	Figs.
Cherries.	Gooseberries.
Apple butter.	Oranges.
Apricots.	Strawberries.
Blackberries.	Apples.

Peaches.
Pineapples.
Raspberries.
Currants.
Prunes.
Raisins.
Dates.

4. Confectionery, sirups, soda fountain supplies, and sirups and soft drinks, not including grape juice, including therein, but in nowise limiting the foregoing general description, the following, to wit:

Apple cider.
Cherry juice.
Coca Cola.
Creme de menthe.
Crushed nut frappe.
Ginger ale.
Green pineapple sirup.
Lemon extract.
Marshmallow topping.
Orange extract.
Root beer.
Vanilla extract.
Vin fiz.

5. Molasses, honey, jams, jellies, and preserves of all kinds.

6. Spices, sauces, condiments, relishes and sauerkraut, including therein, but in nowise limiting the foregoing general description, the following, to wit:

Catsup.
Chilli sauce.
Cinnamon.
Cloves.
Mustard.
Mustard seed.
Olives.
Oyster cocktail sauce.
Pepper.
Pickles.
Spinace chili.
Tomato catsup.

7. Coffee, tea, chocolate and cocoa.

8. Nuts, including therein, the following, to wit:

Almonds.
Pecans.
Walnuts.

But not including peanuts.

9. Flour, sugar and rice.

10. Bread, wafers, crackers, biscuits.

And further perpetually enjoining and restraining said individual defendants and each of them from individually or jointly, either directly or indirectly, by themselves or through their agents, servants or employees, adopting any device or arrangement which by reason of the relation of said individual defendants or any of them to the corporation defendants or any of them would have the purpose or effect of giving to such business of dealing in the articles hereinabove in this paragraph mentioned and described, in which business such individuals or any of them may be substantially interested, an advantage over their competitors similar in purpose or effect to any advantage now enjoyed by any of the corporation defendants through their distributing system.

Sixth. That the defendants and each of them be, and they are hereby, perpetually enjoined and restrained from, in the United States, owning and operating or conducting, either directly or indirectly, severally or jointly, by themselves or through their officers, directors, agents, or servants, any retail meat markets in the United States; provided, however, that nothing contained in this decree shall prohibit said defendants or any of them from continuing to conduct the retail meat markets located at their several plants and maintained by said defendants primarily for the accommodation of their own employees as long as said retail meat markets shall be continued to be operated for that purpose.

Seventh. That the defendants and each of them be and they are hereby perpetually enjoined and restrained from owning, directly or indirectly, jointly or severally, by themselves or through their officers, directors, agents,

or servants, any capital stock or other interest whatsoever in public cold-storage warehouses in the United States; provided, however, that nothing herein contained shall be construed to prevent the defendants or any of them from owning capital stock or other interests in any corporation, firm, or association owning or operating, or from themselves owning or operating, the public cold-storage warehouses now maintained by the defendants or any of them at stockyards where said defendants or any of them now maintain packing plants, nor to prevent any of said defendants, directly or indirectly, from establishing, owning, maintaining, or leasing necessary cold-storage facilities or space required in good faith for the storage of commodities in which they or any of them may be interested, nor from renting space in any cold-storage warehouse directly or indirectly owned or leased by any of them to the public whenever such space is not in good faith required or needed by the defendants for their own use, nor from storing products for the public whenever the space used for that purpose is not in good faith required by the defendants for their own use.

Eighth. That the corporation defendants and each of them be, and they are hereby, perpetually enjoined and restrained from engaging in the United States, either directly or indirectly, jointly or severally, by themselves or through their officers, directors, agents, or servants, in the business of buying, collecting, selling, transporting, except as common carriers, distributing or otherwise dealing in fresh milk and cream, and further perpetually enjoining and restraining said defendants and each of them by themselves or through their directors, officers, agents, and servants, from either directly or indirectly owning any capital stock or other interest in any corporation, firm, or association engaged in the business of buying, collecting, selling, trans-

porting (except as common carriers), distributing, or otherwise dealing in fresh milk or cream; provided, however, that nothing herein contained shall be construed as preventing the corporation defendants or their subsidiaries from buying, collecting, and transporting fresh milk and cream to be used by them or any of them in manufacturing condensed or evaporated or powdered milk or oleomargarine or other butter substitutes, or butter, ice cream, cheese, or buttermilk, or to be used as feed or in combination with any commodity not specifically mentioned and described in paragraph Fourth hereof, and further provided that nothing herein contained shall be construed as preventing said defendants from selling or otherwise disposing of milk and cream bought or collected for manufacture, when such sale or disposition is necessary to avoid waste.

Ninth. That the corporation defendants and each of them be, and they are hereby, perpetually enjoined and restrained from, jointly or severally, by themselves or through their officers, directors, agents, or servants, engaging in, carrying on, or using any illegal trade practices of any nature whatsoever in relation to the conduct of any business in which they or any of them may be engaged.

Tenth. That within ninety days after the entry of this decree such of the defendants as have interests in public stockyard market companies, stockyard terminal railroads, or market newspapers, shall file in this court, for the court's approval, a plan or plans for divesting themselves of all ownership or interest in: (1) public stockyard market companies; (2) stockyard terminal railroads; (3) market newspapers; provided, however, that the court may, in the event that it deems such provision necessary in order to enable the defendants to divest themselves of their interests in public stockyard market companies and stockyard terminal railroads, upon reasonable terms, permit the individual

defendants, or some of them, to retain an interest by way of stock ownership, or otherwise, in any public stockyard market company or stockyard terminal railroad, or in any corporation organized to take over such public stockyard market companies or stockyard terminal railroads or the stock thereof; but no defendant or defendants shall at any time, either individually or jointly, own a controlling interest in any such stockyards or stockyard terminal railroads. Within such period of time after the entry of this decree and the approval of said plan or plans as the court may determine, the defendants shall, in good faith, completely divest themselves of all such ownership or interests in public stockyard market companies, stockyard terminal railroads, and market newspapers. If, within the time so fixed, the defendants shall not have disposed of said interests ordered by the court to be disposed of, and the court upon application shall determine that the defendants have been unable, despite due diligence, to dispose of the same upon reasonable terms, the court may extend the time during which such ownership, control, or interest may continue until the same can be disposed of.

Eleventh. That immediately upon the entry of this decree the defendants shall in good faith and with due diligence proceed to dispose of their interests in, and shall completely divest themselves (to the extent required by this decree) of all ownership of or interest in all public cold-storage warehouses and retail meat markets; but in no event shall the defendants, or any of them, make final disposition of any of their interests in such public cold-storage warehouses and retail meat markets without first obtaining the court's approval to such final disposition. If, within nine months after the entry of this decree, the defendants shall not have finally disposed of their interests in public cold-storage warehouses and retail meat

markets, the Attorney General may apply to the court for an order specifying the time within which the defendants shall finally dispose of all said interests.

Twelfth. That immediately upon the entry of this decree the defendants and each of them shall commence to dispose of such commodities owned or handled by them as are described in paragraphs Fourth and Fifth of this decree and which are to be disposed of by them under this decree, and shall likewise immediately upon the entry of this decree commence to divest themselves of all interests which are to be disposed of by them as and to the extent required by this decree in firms, corporations, and associations, including departments of the business of any of the corporation defendants when any of such departments is sold as a going concern, manufacturing, selling, or otherwise dealing in any of the commodities so mentioned and described in paragraphs Fourth and Fifth of this decree, and shall continue in good faith to dispose of said commodities required to be disposed of hereunder, and to divest themselves of such interests required to be disposed of hereunder, as rapidly as may be consistent with the nature of the business and the seasonal nature of the merchandise involved, and that in any event the defendants and each of them shall completely dispose of said commodities and shall cease to manufacture, job, sell, transport, except as common carriers, distribute, or otherwise deal in the same, and shall completely divest themselves of said interests within two years from the date of the entry of this decree; provided, however, to the end that the provisions of this decree may be complied with, the approval of the court shall be obtained prior to the final disposition of said interests in firms, corporations, or associations manufacturing, selling, or otherwise dealing in any of the commodities mentioned and described in paragraphs Fourth

and Fifth of this decree. At any time within said two years the Attorney General may apply to the court for an order or orders to compel the defendants, and each of them, to make report to the court as to the progress being made by them in disposing of said commodities and in divesting themselves of said interests.

Thirteenth. That the purchaser or purchasers of the defendants' interests in any stockyard shall as a part of said purchase, agree with such of the defendants as now maintain packing plants in said stockyards that for a period of at least ten years after the date when such purchase shall be consummated, said purchasers, their successors or assigns, will continue to maintain and efficiently operate such stockyards and each of them, and such of said defendants as now maintain packing plants at any of said stockyards shall agree with said purchasers, that during the same period of ten years said defendants, their successors or assigns, will continue to maintain and operate said packing plants at the points where the same are now located, unless strikes, shortage of supplies, or other causes beyond the control of either the purchasers, the stockyard companies, or said defendants shall prevent the carrying out of said agreement. Performance by either party shall be a condition concurrent to performance by the other.

Fourteenth. That nothing in this decree contained shall be construed to prohibit anything that may be otherwise lawfully done by the defendants or any of them in the United States in connection with or for the purpose of export trade or foreign commerce or business of the defendants, provided, however, that nothing in this paragraph contained shall limit the effect of the injunction contained in paragraphs Fourth and Fifth of this decree.

Fifteenth. That nothing contained in this decree shall be held to preclude the petitioner from proceeding against any or all of the defendants either civilly or criminally for any violation of any law in connection with the carrying on by them of the business of buying and selling poultry, butter, eggs and cheese, or any other business or activity not specifically mentioned in this decree, nor shall anything contained herein prejudice the Government in any such proceeding, nor shall this decree interfere with or prejudice any legal rights, business or activity of the defendants, or any of them, not prohibited or covered by this decree.

Sixteenth. That for the purpose of (1) enabling the petitioner to ascertain whether the defendants are in good faith carrying out the terms of this decree; and (2) for the purpose of enabling the Attorney General to determine and advise the court whether in any transaction consummated or begun at any time prior to the entry of this decree the defendants, or any of them, have retained and now retain such an interest in or control over any public stockyard market company, stockyard terminal railroad, stockyard market newspaper, stockyard market journal, cold-storage warehouse, retail meat market, or corporation, firm, or association manufacturing, jobbing, selling, distributing, transporting (except as common carriers), or otherwise dealing in any of the commodities mentioned and described in paragraphs Fourth and Fifth of this decree, which would constitute a violation of this decree if the retention of such interest or control had been the result of a transaction consummated or begun subsequent to the date of the entry of this decree; and (3) for the further purpose of enabling the Attorney General to determine and advise the court whether any leases, contracts, or arrangements concerning their, or any of their distribut-

ing systems, made or entered into by the defendants, or any of them, prior to the entry of this decree and in force on the day when it shall be entered are in violation of the terms thereof, then, in the event that the Attorney General in writing notifies the defendant or defendants concerned with respect to such alleged violation, reciting in reasonably specific terms the nature thereof, the corporation defendants are hereby directed to make full and complete discovery to the petitioner with respect thereto, and the corporation defendants are further directed to submit to the Attorney General or to any Assistant Attorney General by him duly authorized, all of their books, records, correspondence or other documents in so far as the same refer to the alleged violation, and to furnish all information concerning the same.

Seventeenth. That all sales, transfers, or other disposition made by any of the defendants since the first day of October, nineteen hundred and nineteen, of any of their interests in public stock yard market companies, stock yard terminal railroads, stock yard newspapers or journals, public cold-storage warehouses and retail meat markets, or in corporations, firms, or associations manufacturing, jobbing, selling, transporting, except as common carriers, distributing or otherwise dealing in any of the commodities mentioned and described in paragraphs Fourth and Fifth of this decree, and all leases, contracts, or arrangements or other disposals made by any of the defendants since the first of October, nineteen hundred and nineteen, affecting their delivery systems, shall be submitted by the defendants to the court for its investigation and determination as to whether the same were made in accordance with the spirit and purpose of this decree, in the same manner and with the same force and effect as though the said sales, dispositions, leases, contracts, or arrangements had been made subsequent to the entry of this decree.

Eighteenth. That jurisdiction of this cause be, and is hereby, retained by this court for the purpose of taking such other action or adding at the foot of this decree such other relief, if any, as may become necessary or appropriate for the carrying out and enforcement of this decree and for the purpose of entertaining at any time hereafter any application which the parties may make with respect to this decree.

WALTER I. McCOY,
Chief Justice

Feby. 27, 1920.

[Consents by attorneys omitted.]

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Supreme Court, U.S.
FILED
MAY 24 1961
JAMES R. BROWNING, Clerk

No. 875

In the Supreme Court of the United States

OCTOBER TERM, 1960

SWIFT & COMPANY, ARMOUR AND COMPANY, and THE CUDAHY PACKING COMPANY, et al.,
APPELLANTS

v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Northern District of Illinois

MOTION TO AFFIRM

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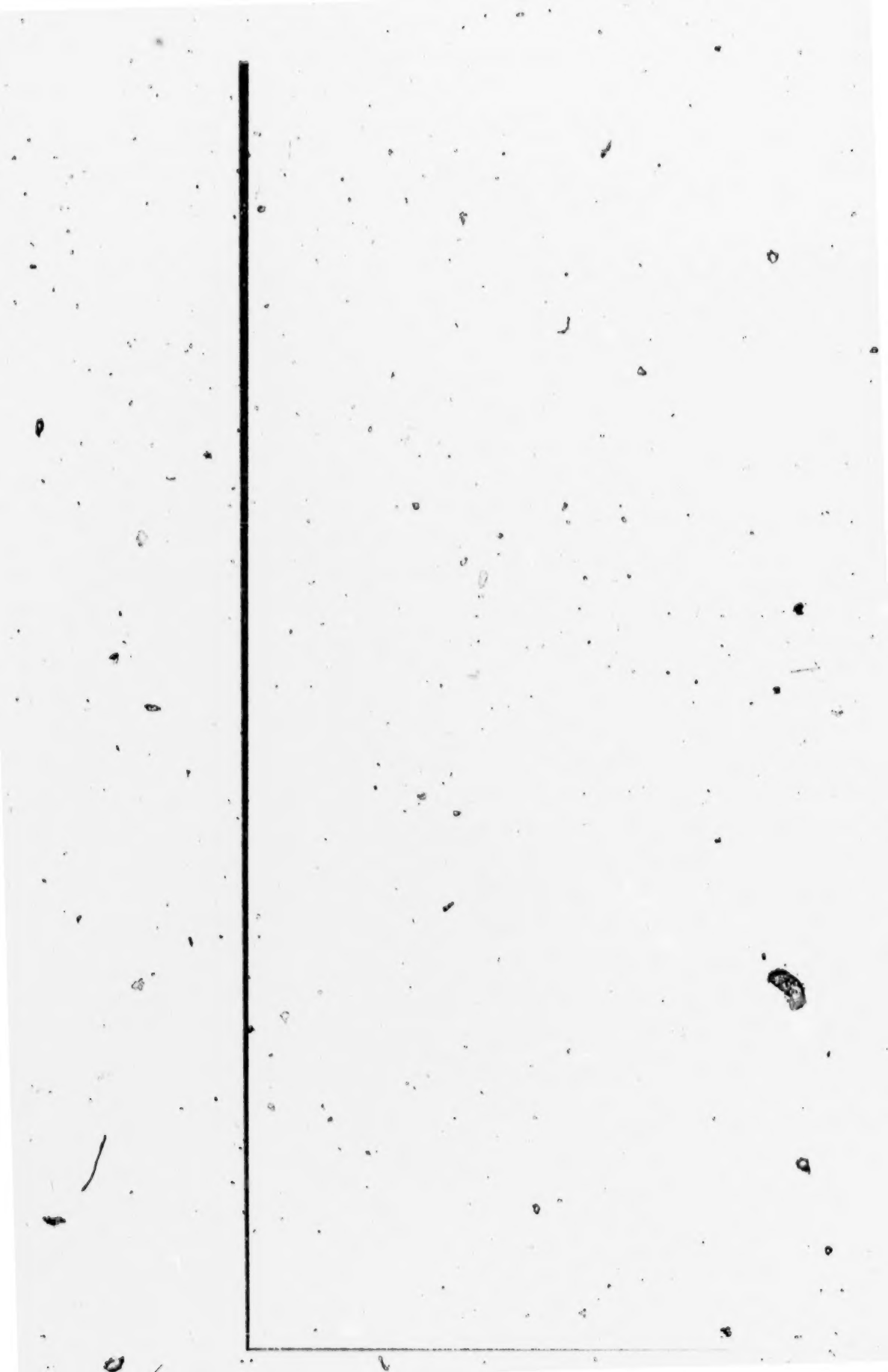

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v.

UNITED STATES OF AMERICA

On Appeal from the United States District Court for the Northern District of Illinois

MOTION TO AFFIRM

The United States moves, pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, that the judgment of the district court be affirmed.

STATEMENT

This case involves the third attempt by appellants to eliminate the prohibitions of a 1920 consent decree which, in general, precluded the major meat packers from engaging in the manufacture, distribution, and

sale of specified grocery and milk products, as well as from selling their meat products at retail. An attempt to void the decree *in toto* was denied by this Court in *Swift & Company et al.* v. *United States*, 276 U.S. 311. An effort to modify the decree to eliminate these prohibitions was rejected by this Court (to the extent it had not been previously rejected by the district court) in *United States* v. *Swift & Company*, 286 U.S. 106. The present proceeding was initiated in 1956 by motions by three of the four parties to the outstanding consent decree, who claimed that changes in the industrial climate since 1930 had eliminated all continuing need for the prohibitions and that maintenance of these restrictions was causing undue hardship to the appellants. After a full hearing, involving the taking of 8,000 pages of testimony and consideration of nearly 1,000 exhibits, the district court in a comprehensive opinion (J.S.A. 1-57)[1] denied the motions.

1. Following an extensive investigation by the Federal Trade Commission in 1917-18 of the nation's meat slaughtering and packing industry (F.T.C., *Food Investigation: Report on the Meat Packing Industry*, 1919), the United States on February 27, 1920, filed a civil complaint (J.S.A. 58-85) alleging that the five largest meat packing concerns[2] by reason of their size and certain predatory practices had acquired con-

[1] J.S.A. refers to the separate appendix filed with appellants' jurisdictional statement.

[2] The packers were Swift & Co., Armour and Company, Morris & Company (absorbed by Armour in 1923), Wilson & Company, and the Cudahy Packing Company.

trol of the "supply and the price of the food supplies of the nation" in violation of the Sherman and Clayton Acts (J.S.A. 66). Specifically, the complaint charged that the defendants by combination and conspiracy had gained control of the nation's dominant stockyard facilities, the terminal railroads connecting the yards with long-haul rail lines, and the trade newspapers and market journals, and had developed vast nationwide systems of distribution, involving the use of 90% of all available refrigerated rolling stock and great numbers of private and public cold storage facilities. By the use of this control and their own enormous size, it was alleged that the defendants had gradually eliminated their competitors as significant factors in the marketing of livestock and, in order to eliminate competition among themselves, had entered into percentage purchasing arrangements allocating the respective shares of the total supply offered at the various stockyards. Finally, the complaint charged (J.S.A. 78) that the defendants, having destroyed competition in meats, attempted to gain control of non-meat food supplies that might be substituted for the higher priced meat. That objective was sought by the acquisition of a large number of non-meat food concerns and the consummation of a number of exclusive output contracts with other suppliers. In marketing these "substitute" products, the defendants utilized their existing distributive facilities at virtually no increase in overhead or operating expenses and employed their advantages "temporarily to fix prices so low as to gradually eliminate competition" (*ibid.*). The prayer for relief sought, *inter alia*, to

preclude the defendants' use of their distribution facilities to enhance their position with respect to non-meat products (par. IV, J.S.A. 83-84), and, as a separate matter, perpetually to exclude the defendants from engaging in such non-meat activities (par. V, J.S.A. 84).

Although the defendants (on February 27, 1920) filed answers denying the unlawful acts alleged, they simultaneously consented to the entry of a final decree enjoining the companies, *inter alia*, from: (1) using or permitting others to use their distributive facilities for handling certain enumerated non-meat food products (par. Third, J.S.A. 88-89); (2) manufacturing, transporting, wholesaling, or retailing the prohibited items (par. Fourth, J.S.A. 89-93); (3) operating or owning retail meat stores (par. Sixth, J.S.A. 96); and (4) handling or dealing in fresh milk or cream (par. Eighth, J.S.A. 97-98).[3]

2. In 1929, after the basic validity of the consent decree had been sustained by this Court in *Swift & Co. et al.* v. *United States*, 276 U.S. 311 (see also *United States* v. *California Cooperative Canneries*, 279 U.S. 553), petitions were filed by Swift and Armour in what is now the District Court for the District of Columbia seeking substantial modification of the decree because of certain radical and revolutionary changes in economic conditions, merchandising methods, etc. and because of alleged hard-

[3] With the exception of some 30 non-food items, including specified building materials and food-handling equipment (see par. Third, J.S.A. 92-93), the defendants were left completely free to diversify into any non-food field they chose.

ship to the petitioners in not being permitted to use existing distributive facilities for handling the prohibited items. The district court denied the request to permit the retailing of both groceries and meats, but granted the petitions to the extent of permitting the companies to manufacture the prohibited non-meat products and distribute them at wholesale.

On appeal, this Court reversed (*United States* v. *Swift & Co.*, 286 U.S. 106), on the ground that the defendants, who had consented to the restrictions of the decree "with their eyes open" (p. 115), could still use existing facilities to distribute grocery products to the disadvantage of their competitors, and still retained such enormous size as to enable them to "starve out weaker rivals" (p. 116). The growth of the chain stores to "affluence and power" was, the Court held (p. 118), not controlling because they still looked to the defendants, individually and collectively, for substantial portions of their meat requirements, thus affording the defendants "a post of vantage" if permitted to deal in the prohibited lines.

3. The present phase of this litigation began in 1956 when the three appellants filed new petitions for modification of the decree. As the court below indicated, "[t]he underlying theory of [these petitions] is the same as that relied upon in the 1930 petitions * * *" (J.S.A. 26). It was alleged that by reason of substantial changes in the food industry, including the increasing inadaptability of existing distributive facilities to the distribution of grocery and milk products and the continuing ascendancy of the large chains and cooperatives, the 1920 decree was no longer

needed to protect the consuming public from possible competitive abuses but was in fact a positive instrument of wrong, working a financial hardship on the defendants (J.S.A. 26-30).

After a lengthy hearing, the district court rejected appellants' contentions (J.S.A. 1-57). It held that the proper test for determining the modification of antitrust consent decrees, as set out by the Court in the *Swift* case, *supra*, was whether conditions which supported the decree at the time of its entry "have so altered with the passage of time that the restraint can no longer be justified, and that they [the petitioners] are suffering injury, without counterbalancing advantage to the public interest, sufficient to move a court of equity to act" (J.S.A. 43). The court rejected the contention that lack of continuing public need for the restraints of the decree and hardship suffered by the appellants were alternative standards for modification, stating (J.S.A. 40):

> They are rather correlative elements of a single standard. As need is diminished, a lesser showing of hardship will tip the scales in favor of modification, and as the defendants' suffering increases, their burden of showing decreased need is correspondingly lightened.

Applying these criteria to the facts before it, the court concluded that notwithstanding the decree the appellants individually and collectively "remain, to the extent that they were in 1930, the dominating forces in the meat industry" (J.S.A. 53). The undisputed evidence showed that in 1956 the appellants accounted for nearly 40% of the total commercial

slaughter of livestock in the United States (GX 2), with substantial increases since 1920 in every species except cattle (GX 5-A, 5-B, 5-C, 5-D).[4] Between 1929 and 1956, Swift's total sales increased from approximately $1 billion to $2.4 billion and Armour's from approximately $1 billion to $2 billion (GX 12b), each exceeding the total combined sales of the nine largest packers not subject to the decree (*ibid.*). By 1951, Cudahy's total sales had increased from $268 million to $640 million, but by 1956, for reasons not connected with the decree (J.S.A. 56), had declined to $291 million[5] (*ibid.*).[5] In 1956, appellants accounted for 56% of the total assets of the entire meat packing industry (Swift, $561.6 million; Armour, $468.3 million; Cudahy, $56.5) (GX 12). The net worth of Swift and Armour was $378 million and $204 million respectively, compared with $36 million for Oscar Mayer, whose net worth was the greatest of appellants' principal competitors (GX 12d). Each appellant maintained huge reserves of working capital (GX 242-243), and by the magnitude of their advertising and public relations expenditures they have made their names the best known in the meat field

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[4] The total slaughter of all species by Swift and Armour increased from 28.1 million head in 1920 to 33.2 million in 1929 to 42.3 million in 1956 (GX 3). Cudahy's total slaughter increased until 1950 when a period of decline began (*ibid.*).

[5] The evidence showed, however, that in 1959, as the result of reorganization and planned improvements in operating efficiencies, Cudahy's sales had advanced to $352 million (GX 213, Tr. 6067-68, 6076-80), slightly less than the sales of the largest packer not subject to the decree (GX 12b).

(see, *e.g.*, GX 180, 206, 207, 208). Furthermore, unlike any of their principal competitors, the appellants are highly diversified companies producing, in addition to full lines of meats and meat products and permitted grocery items, such diversified goods as pharmaceuticals, chemicals, soaps, salt, additives, fertilizers, cleansers and insecticides (GX 242, 244, 88, 88).

On the basis of this evidence, the district court held that appellants' control over nearly half of the nation's meat supply would give them a substantial advantage over retail competitors if they were permitted to enter this field[6] and that the operation of general retail food stores by the appellants "would tend to restrain competition by providing [them] with captive outlets for both their meats and groceries, to the exclusion of competitive products" (J.S.A. 54). If permitted to engage in general wholesale food operations, the court concluded, appellants would enjoy "the competitive advantages of offering a full line of products and the economies resulting from large volume and combined managerial and sales staffs" (J.S.A. 55).[7]

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[6] In 1956, the large corporate chains did an insignificant amount of their own slaughtering and processing of meats, and continued to rely on the defendants and other packers for their supplies of meat and meat products (GX 205). None of the 2,640 grocery wholesalers, in 1958, engaged in the slaughtering of livestock or the processing of meats (SX 18, GX 201, Tr. 7409, 7431, 928).

[7] While the district court held that appellants' distribution facilities "would not afford any substantial advantage in the distribution of groceries along with meats" (J.S.A. 55), the evidence showed that appellants' branch houses and the

With respect to the correlative question of hardship, the court noted that appellants' profits and rate of growth were lower than those of other concerns in the food industry. But it pointed out that, to the extent that this resulted from prohibitions upon diversification into more profitable lines of endeavor, this was not a new or unforeseen burden, but had been specifically contemplated in framing the decree (J.S.A. 56). Since none of appellants' meat packing competitors had in any substantial degree diversified their activities into other food lines, the court concluded that any competitive difficulties appellants (and particularly Cudahy) had encountered in their meat operations were not attributable to the decree and hence not hardship within the meaning of this Court's decision in *United States* v. *Swift & Co.*, *supra (ibid.)*.

In sum, the district court held that the defendants had failed to meet the burden of showing either the necessary lack of continuing public need for the decree or the degree of hardship which, considered separately or together, would warrant modification of the decree.

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other elements of their vast distributive systems have not been entirely replaced by direct sales from the processing plant to the customer (GX 43, 139, Tr. 4045, 622-24, 742-43, 1645). In 1956, for example, approximately 50% of Armour's sales, including certain non-meat products not in the prohibited category, were made through its branch houses (GX 102a). In many instances, where such intermediate facilities have been closed, specialized sales units have been staffed from their personnel forces (SX 3, 5), with such newly organized units being readily adaptable to the sale of prohibited products at little increase in overhead costs (GX 214, pp. 212, 216; GX 244, pp. 2, 5; Tr. 3151-3152).

ARGUMENT

This is the third time appellants have sought to cancel the provisions of the 1920 consent decree which, by prohibiting the major meat packers from entering major portions of the grocery field, have played such a significant role in keeping these two areas of commerce competitive. The contentions now made are largely variants of those rejected by the Court, in 1932, in *United States* v. *Swift & Co.*, 286 U.S. 106, and the developments since that date, most of which are continuations of trends then clearly visible, call for no different result here. Nor does the decision of the district court rest upon any new principles inconsistent with those established by Mr. Justice Cardozo's landmark opinion in the earlier case. In this light, the questions now presented are so unsubstantial as not to need further argument, and the Court may appropriately grant summary affirmance.

1. The district court found that if the appellants were permitted to operate retail food stores "they would enjoy a substantial advantage over their rivals as a result of their control of nearly half the nation's meats and meat products," and that "[v]ertical integration through acquisition of existing retail stores or chains would tend to restrain competition by providing the defendants with captive outlets for both their meats and groceries, to the exclusion of competitive products" (J.S.A. 54). It also concluded that if the appellants were permitted to sell groceries and milk and cream at wholesale along with their meats "the competitive advantages of offering a full

line of products and the economies resulting from large volume and combined managerial and sales staffs would afford the defendants a competitive advantage similar to that which has largely eliminated the butcher shop, the green grocer, and the bakery shop from the retail trade" (J.S.A. 55). Appellants do not directly challenge the factual validity of either of these two sets of findings.[8] Rather, the suggestion is that the findings cannot support a continuation of the decree's prohibitions because they improperly take account of the vast size of appellants' meat packing enterprises, and rest on considerations not expressly set out in the original 1920 complaint as a basis for the relief requested. Neither of these contentions bears analysis.

(*a*). The alleged irrelevance of appellants' size and position in the meat industry is similar to an argument made and rejected at the time of the 1932 case. As Mr. Justice Cardozo there pointed out, "The original decree * * * was framed upon the theory that even after the combination among the packers had been broken up and the monopoly dissolved, the individual units would be so huge that the capacity to engage in other forms of business as adjuncts to the

[8] While the district court did not in terms address itself to the question whether appellants should be permitted to manufacture the prohibited products, with wholesale and retail distribution being turned over to unaffiliated concerns, it is clear that manufacture cannot be insulated from distribution and that many of the same advantages which the court held would inhere in joint meat-grocery wholesaling or retailing by appellants would likewise be present in the manufacturing situation.

sale of meats should be taken away from them altogether" (*United States* v. *Swift & Co.*, 286 U.S. 106 at 116). Stressing that while "[m]ere size * * * is not an offense against the Sherman Act * * * size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past" (*ibid.*), the Court stated (at 118), in language which is strikingly parallel to that of the district court here:

> Much is made in the defendants' argument of the rise of the chain stores to affluence and power, and especially of chains for the sale of groceries and other foods. Nothing in that development eradicates the ancient peril. * * * They [the chains] look to the defendants for their meats, and if the ban of this decree is lifted, they will look to the defendants for other things as well. Meats and groceries today are retailed at the same shops, departments of a single business. The defendants, the largest packers in the country, will thus hold a point of vantage, as compared with other wholesale grocers, in their dealings with the chains. * * *[9]

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[9] The court below said in the present case (J.S.A. 55):

> If the defendants were permitted to sell groceries and fresh milk and cream at wholesale along with their meats, the competitive advantages of offering a full line of products and the economies resulting from large volume and combined managerial and sales staffs would afford the defendants a competitive advantage similar to that which has largely eliminated the butcher shop, the green grocer, and the bakery shop from the retail trade.

See also *supra*, pp. 6-8.

(*b*). Nor can it properly be contended that the ability of the large meat packers to utilize "their gigantic size" to conduct price wars or otherwise act so as "to starve out weaker rivals", if they were allowed to reenter the grocery business, was not a significant basis for the prohibitions of the original decree. As the Court said in 1932, "The original decree * * * was framed upon that theory" (286 U.S. at 116). The contention that the separation of meats from groceries rested exclusively or even primarily upon the advantages accruing to the appellants through their then ownership of refrigerated cars and branch houses (allegedly no longer of significance in the distribution of groceries or milk products [10]) is clearly without substance. The *Swift* opinion gave as the "second reason stated in the bill of complaint" "the practice followed by the defendants of fixing prices for groceries so low over temporary periods of time as to eliminate competition by rivals less favorably situated", and expressly held that "to curb the aggressions" of appellants the "privilege [to deal in groceries] should be renounced forever, and this whether the units within the combination [*i.e.*, the individual appellants] were acting collectively or singly" (286 U.S. at 116-117). See also 286 U.S. at 118-119.

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[10] However, appellants admitted at page 32 of their instant Motion and Petition for Modification that their motor transportation facilities could be advantageously utilized on the return trip from meat delivery points for transporting grocery products to processing plants.

In addition, it should be pointed out that the district court in the earlier case had relieved appellants from the injunctions of Paragraph Three of the decree (J.S.A. 88-89), precluding the use of their distributive facilities for the prohibited non-meat products, on the ground that refusal to permit them to make use of unneeded capacity was unduly harsh. In view of this holding, this Court naturally devoted special attention to that part of the decree and the specific allegations of the complaint directed thereto. But, as the court below pointed out, the decree is not limited to prohibiting the use of appellants' special distributive resources for non-meat products. Instead, it contains a separate provision (Paragraph Four (J.S.A. 89-93)) which, aside from the special problems arising out of the distribution facilities, totally and permanently barred the appellants from ever again entering these fields, *even after they disposed of the surplus or "obsolete" distribution facilities as contemplated by Paragraph Three* (J.S.A. 89). It is clear therefore that the distribution facilities aspect of the decree was not the sole or primary basis for the prohibition on appellants engaging in the prohibited non-meat activities, and the asserted elimination of these particular advantages does not require modification of the basic limitations.

2. Appellants also contend that the district court improperly went behind the complaint in determining the basis and objective of the provisions of the decree which they seek to modify. But their unsupported assertion that the reason for or purpose of a provision can only be ascertained through examina-

tion of the specific claims of violation or impropriety set forth in the complaint is without any merit. As this Court has held, relief in an antitrust suit "is not limited to prohibition of the proven means by which the evil was accomplished, but may range broadly through practices connected with acts actually found to be illegal. Acts entirely proper when viewed alone may be prohibited". *United States* v. *U. S. Gypsum Co.*, 340 U.S. 76, 88-89. See *International Salt* v. *United States*, 332 U.S. 392, 400-401. Thus, the fact that the complaint specifically refers to only *one* means by which the appellants set about "controlling the nation's supplies of" the prohibited non-meat products (J.S.A. 78), does not indicate that the injunctive relief to which they agreed was aimed solely at eliminating that particular abuse.[11] This is made clear in the complaint itself, for the prayer for relief (J.S.A. 83-84), like the resulting decree (J.S.A. 88-93), contains separate paragraphs relating first to the need for precluding the use of appellants' meat distribution facilities for handling any of the prohibited non-meat products and then to the more comprehensive need for perpetually excluding appellants from manufacturing, distributing, or selling such products. The district court here, like this Court's opinion before it (see, *e.g.*, 286 U.S. at 116-119), was thus clearly correct in looking beyond the narrow

[11] As the district court pointed out below (J.S.A. 47), under appellants' thesis, there could be no explanation for paragraph six of the decree prohibiting their ownership or operation of retail meat markets—a subject not directly referred to in the complaint.

specifications of particular past abuses, as set forth in the complaint, in evaluating whether the need for the broader injunctive provisions of the decree has been "attenuated to a shadow" (286 U.S. at 119).

3. Appellants likewise urge that the district court misconstrued the 1932 opinion of this Court in holding that lack of continuing need for a decree's prohibitions and the hardship its maintenance imposes upon the consenting parties are "correlative elements of a single standard" (J.S.A. 40), rather than alternative bases for modifying the decree. Since the court below found that appellants had shown neither a lack of continuing need for the contested provisions (J.S.A. 55) nor that they imposed any "new or unforeseen" hardship in the sense required by the *Swift* decision (J.S.A. 56), it would not appear that any question as to the applicable standard for modification is now presented to the Court.

It is perfectly clear, morever, that this Court's decision in *United States* v. *Swift*, *supra*, does not establish alternative paths for securing relief from a decree's prohibitions. Instead, the opinion phrased the issue in terms of whether "the restraints of the injunction, however appropriate and just in February 1920, were now useless and oppressive" (286 U.S. at 113). The district court may be correct in concluding that this and other language of the opinion shows that the Court would not require a party to show both that there is no continuing need for a prohibition *and* that it causes "hardship so extreme and unexpected as to justify [a court] in saying that they are the victims of oppression" (p. 119). But

nothing in the earlier opinion justifies a reading under which either path, considered alone, could properly lead to eliminating a prohibition to which the appellants had previously agreed.

4. Finally, appellants argue (J.S. 28-29) that the district court erred "by concluding that appellants are not entitled to relief because they bargained away their right to modification so long as they retain their size as meat packers". But the court did not conclude that appellants had bargained away their right to any modification fully justified by subsequent circumstances, but only that their consent to a broad prohibition against *any* future participation in certain fields of endeavor had estopped them from arguing that the decree's prohibitions had a narrow objective already accomplished. In so holding, the court merely echoed this Court's opinion in the prior *Swift* case. This Court stated, "[w]e do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition. Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court" (286 U.S. at 116-117). Similarly, the opinion indicated, "[w]isely or unwisely, they [appellants] submitted to these restraints upon the exercise of powers that would normally be theirs. They chose to renounce what they might otherwise have claimed, and the decree of a court confirmed the renunciation and placed it beyond recall" (p. 119). This language is directly apposite to refute appellants' repeated

contentions that they are being excluded from lawful activities.

Neither the *Swift* opinion nor the ruling below suggests, however, that the consent nature of the decree necessitates any greater showing of lack of continuing need or hardship than would have been required in the case of a litigated decree. For this reason, this Court's recent decision in *System Federation No. 91, Railway Employes' Department* v. *Wright*, 364 U.S. 642, is not inconsistent with the decision below in stressing that a party consenting to an equity decree does not thereby preclude himself from seeking modification under changed circumstances. Appellants admit (J.S. 28) that the district court here reached a similar conclusion (see J.S.A. 37).

CONCLUSION

The district court's opinion refusing to modify the consent decree, so as to allow the major meat packers now to enter the grocery and milk businesses and to sell their products at retail, rests upon a proper and permissible evaluation of the evidence under the standards laid down by this Court in construing this same decree in *United States* v. *Swift & Co.*, 286 U.S. 106. Appellants present no significant question of law not previously resolved. The judgment of the court below should accordingly be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 875

SWIFT & COMPANY, ARMOUR AND COMPANY, AND THE CUDAHY PACKING COMPANY, ET AL.,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE.

The Western States Meat Packers Association, Inc., Texas Independent Meat Packers Association, Luer Packing Company, Pacific Meat Company, Inc., McFarland, Inc., and Modesto Meat Company hereby respectfully move for leave to file a brief as *amici curiae* in this case. The consent of counsel for the appellants has been requested but refused.

The Western States Meat Packers Association, Inc., a non-profit California corporation with principal office in San Francisco, California, represents 525 small meat packers

and processors in the Rocky Mountain and Pacific Coast states, Western Texas and Hawaii. No members manufacture, distribute at wholesale or sell at retail any of the grocery items prohibited by the Consent Decree, and none of the members sell meat at retail.

Texas Independent Meat Packers Association, a nonprofit Texas association with principal office in Dallas, Texas, represents 300 small meat packers and processors in the state of Texas. Its members do not, with few exceptions, engage in the wholesaling or retailing of any of the prohibited items (groceries), nor do the members engage in the retail sale of meat.

Luer Packing Company, a California corporation with principal office in Los Angeles, California, engages in the business of slaughtering and processing meat.

Pacific Meat Company, Inc., an Oregon corporation with principal office in Portland, Oregon, engages in the business of slaughtering meat.

McFarland, Inc., a Utah corporation with principal office in Salt Lake City, Utah, engages in the business of slaughtering and processing meat.

Modesto Meat Company, a California corporation with principal office in Modesto, California, engages in the business of slaughtering and processing meat.

None of the corporate movants sell meat at retail nor do they manufacture, distribute at wholesale or sell at retail any of the grocery items prohibited by the Consent Decree. None of the movants or the meat packers they represent are listed among the country's ten largest meat packers.

The interest of movants in this case arises from the fact that, as small meat packers and associations representing small meat packers, they constitute a class protected by the equity decree entered in 1920, upheld without

modification by this Court in 1932, *United States* v. *Swift & Co.*, 286 U. S. 106, and in effect over the intervening years. The small meat packers, including movants, are the immediate beneficiaries of the consent decree and will be directly and immediately injured if the decree is modified as requested by appellants.

In the District Court, the Government dealt comprehensively with the points raised by the three appellant meat packers. The Government, however, represents primarily the interest of the general public in free competition, which will be injured only after the competition of the appellant meat packers with the small packers is lessened or destroyed. On the other hand, the small meat packers represented by movants would be directly and immediately affected by any modification of the decree. This interest of movants was recognized and their participation as *amici curiae* was granted by the District Court, 189 F. Supp. 885, 901 (N. D. Ill. 1960).

As an illustration, movants have a vital interest in retaining the prohibitions of paragraph Sixth of the Decree which enjoins appellants from owning or otherwise controlling retail meat markets in the United States. The District Court recognized and stressed this interest, stating:

> "If the defendants were to engage in the business of operating general retail food stores, they would enjoy a substantial advantage over their rivals as a result of their control of nearly half the nation's meats and meat products. Vertical integration through acquisition of existing retail stores or chains would tend to restrain competition by providing the defendants with captive outlets for both their meats and groceries, to the exclusion of competitive products." 189 F. Supp. at 912.

The public interest would suffer, but only after movants'

businesses, which now provide full and healthy competition, had been destroyed.

Movants' participation in this case as *amici curiae* is requested only in the event the Court does not summarily affirm the District Court's order entered on December 12, 1960, dismissing appellants' petitions for modification on the consent decree. Despite the importance to a competitive economy of this litigation, summary affirmance is appropriate here because the District Court, after a lengthy trial and a comprehensive analysis of the facts followed and applied the law as set forth in the opinion of Mr. Justice Cardozo in this Court's prior decision in this case, *United States* v. *Swift & Co.*, 286 U. S. 106.

For the reasons expressed herein, movants request that, in the event the Court notes probable jurisdiction, their motion for leave to file a brief as *amici curiae* in this case be granted.

Respectfully submitted,

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UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Northern District of Illinois

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

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The Government asserts that this appeal presents no substantial question for review. Yet, it takes issue with each question raised by appellants and favors the district court's departure from the standards for consent decree modification established by this Court in *United States v. Swift & Co.*, 286 U.S. 106 (1932). Like the district court, the Government reads appellants' consent to the decree as effectively barring relief despite this Court's holding that such consent "was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be" (286 U.S. at 115). Similarly, it ignores as the touchstone for relief the disappearance of the reasons for the decree explicitly set forth in its own complaint and in the *Swift* opinion. In their place it sub-

stitutes mere statistical measurements of appellants' size and resources, and it admits that the district court's conclusions as to so-called competitive advantages which appellants would enjoy in the grocery field rest entirely "on the basis of this evidence" (Gov't Motion 8). Finally, the Government suggests that the decree must be continued in force until appellants are suffering "extreme and unexpected" hardship, even though all need for the decree restrictions has disappeared. Thus, the Government's motion underscores the significant errors committed by the district court. We submit that those errors raise substantial issues which are entitled to full review by this Court.

While the Government stresses that this is the third time appellants have sought relief from the pertinent provisions of the decree, it neglects to mention that 30 years have elapsed since the last proceedings. More importantly, it would have the Court ignore, as the Government does, the significance of the sweeping economic changes which have occurred during this long period of time.

1. There is a striking absence in the Government's motion to affirm, as in the opinion below, of any realistic standard for the modification of this decree as well as other antitrust consent decrees. While both acknowledge the principle of modification, they advance a test which would defeat that principle.[1] According to the district court, "this is not a case where equity intervened to correct

[1] The Government places recurrent emphasis (Gov't Motion 4, 14, 15, 17) upon the theme that the decree "totally and permanently barred the appellants from ever again entering these [non-meat] fields" (Gov't Motion 14). But the Government must recognize, despite its innuendo, that the injunction "is 'permanent' only for the temporary period for which it may last. . . . Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted" Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941).

a temporary dislocation or to afford a respite so that competition could be restored. . . . [Appellants] chose to retain size as meat packers rather than to risk further dismemberment, at the price of abandoning the opportunity to extend into other fields" (Op., App. 57). The Government in substance supports this view that appellants, by a settlement, bargained away a right to engage in the grocery business as long as they remain large meat packers. While shrinking from an explicit approval of the court's bargain theory, the Government nevertheless contends that appellants' "consent to a broad prohibition against *any* future participation in certain fields of endeavor had estopped them from arguing that the decree's prohibitions had a narrow objective already accomplished" (Gov't Motion 17).

Appellants do not argue for a "narrow" reading of the decree's objectives. Rather they reason that its objectives were those stated by the Government in its own complaint and by this Court in the *Swift* case, *i.e.*, the protection of competition against explicit dangers then alleged to exist. The district court made no finding that those dangers hold today; indeed, its factual conclusions and the undisputed evidence demonstrate that they do not. To hold that relief is unwarranted under these circumstances is to repudiate the holding of the *Swift* opinion that the proper inquiry is whether "dangers, once substantial, have become attenuated to a shadow" (286 U.S. at 119). In effect, the decision below has declared the immutability of this and other consent decrees, contrary to *Swift* and the more recent holding in *System Fed'n 91, Railway Employes' Dep't v. Wright*, 364 U.S. 642 (1961).

The Government contends that this approach does not conflict with the *System Fed'n 91* case that a bargain of the parties to a consent decree cannot reduce the freedom of

the Court to modify the decree to reflect changed circumstances. The motion says that the district court opinion does not require any greater showing than would be required in the case of a litigated decree (Gov't Motion 18). The district court, however, made directly contrary statements (Juris. State. 28-29). Further, if the Government's argument means that the same impossible standards would be imposed upon modification of litigated antitrust decrees, full review by this Court is all the more important.

So rigid are the tests adopted by the district court and the Government that any consideration of even partial relief is foreclosed. As pointed out in the jurisdictional statement (32-33), the district court's sweeping rationale caused it to refuse any kind of flexible adjustment of the decree. The court even denied the privilege of manufacturing, as distinguished from wholesaling and retailing, without any finding on the subject, and the Government acknowledges this important omission (Gov't Motion 11, note 8).

The Government and the district court, because of their estoppel and bargain theories, have ignored the distinction, so carefully drawn by this Court in the *Swift* case, "between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative" (286 U.S. at 114). This crucial misconception is manifested in the district court's erroneous assertion that any modification in this case "would invite the Standard Oil trust, broken up by *Standard Oil Company* v. *United States*, 221 U.S. 1 (1911), now to re-assemble" (Op., App. 57). But obviously the *Standard Oil* case is not in point here; no change in circumstances could make the monopoly there condemned any the less illegal today. By contrast, otherwise lawful business ac-

tivities are denied to appellants by the restraints here in issue. "Provisional and tentative," they have been held immutable although changes wrought by 40 years have eliminated the dangers of anti-competitive abuse which called them into being.

2. The district court held against appellants by completely departing from the 1932 *Swift* decision of this Court as to the reasons for the decree provisions in issue (Juris. State. 21-29). The Government's motion to affirm approves this departure by taking a position which is diametrically opposed to that advanced by it to this Court in 1932.

In 1932, the Government opened its argument to this Court with the statement: "The 1920 decree having been entered without any findings of fact by the court, its purpose must be determined from the allegations of the Government's bill" (Gov't S. Ct. Brief, 1932, 25-26). It went further and stated, that the "principal ground" set forth in the complaint for both paragraphs Third and Fourth of the decree, and the ground upon which the injunction actually rested, was the ability of the defendants to distribute non-meat commodities through their meat distribution facilities with comparatively no increase in overhead, and the use of this advantage temporarily to fix prices so low as to eliminate competition (Gov't S. Ct. Reply Brief, 1932, 1-2, quoted in full, Juris. State. 22, note 9). This position was adopted by the Court, which ruled that there were "two reasons, and only two", for the restraints against engaging in the prohibited food fields and that these were the reasons set forth in the complaint (286 U.S. at 115).[2]

[2] This was the second time this Court held that the complaint in this case is the proper basis for determining the reasons for provisions of the decree. In Swift & Co. v. United States, 276 U.S. 311, 329 (1928), the Court in sustaining the validity of the decree, stated that by their consent, the defendants "left to the court the

In its present motion to affirm, the Government repudiates its former statements to this Court. Dismissing the allegations of its complaint as "narrow specifications of particular past abuses" (Gov't Motion 15-16), the Government now argues, in language squarely contradicting its briefs in 1932: "It is clear . . . that the distribution facilities aspect of the decree was not the sole or primary basis for the prohibition on appellants engaging in the prohibited non-meat activities . . ." (Gov't Motion 14). This radical reversal has been necessitated by its attempt to sustain the district court's continuance of the decree in the face of overwhelming evidence that the dangers explicitly recognized in the complaint and in the *Swift* opinion are nonexistent today. Indeed, the district court expressly found that the distribution advantage could no longer be enjoyed, and it tacitly agreed that the danger of predatory price-cutting had also been removed, for it refrained from any finding adverse to appellants on this question.[3]

To rationalize the result reached below, both the Govern-

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power to construe the pleadings, and, in so doing, to find in them the existence of circumstances of danger which justified" the injunctions.

The Government's motion to affirm exaggerates appellants' position on this issue when it states that appellants assert that "the reason for or purpose of a provision can only be ascertained through examination of the specific claims" of a complaint (Gov't Motion 14-15). Appellants' position is that it is error to ignore such a clear statement of reasons as appears in the instant complaint, especially when this Court has twice held the same complaint to be the proper frame of reference for ascertaining the reasons for the provisions of this decree.

[3] While the text of the Government's motion to affirm takes the position that the absence of the old distribution advantage is immaterial, in a footnote the Government (note 7 at 8-9) expresses disagreement with the district court's finding that the distribution advantage is gone. However, the record references cited by the Government do not support the argument made, as will be shown when an opportunity is presented to brief the question fully for this Court.

ment and the district court argue that the complaint reasons do not satisfactorily account for all of the decree restraints in issue. Further, they contend that this Court's opinion in 1932 did not really hold that those reasons account for all of the paragraphs of the decree barring appellants from the now-prohibited food fields. These arguments do not square with the *Swift* ruling. Thus, contrary to the Government's contention that the Court really devoted its "special attention" only to paragraph Third, which prohibits the use of meat distribution facilities for groceries (Gov't Motion 14), Mr. Justice Cardozo gave "no separate consideration" to this paragraph at all (286 U.S. at 113). Instead, he devoted his attention solely to the broader prohibitions of paragraph Fourth which prohibit all "trading in groceries" (286 U.S. at 115).[4] Similarly, the argument of the Government and of the district court that the enumerated reasons do not explain the injunctions against retailing runs directly counter to the Court's conclusion that the reasons for the restraints against manufacturing and wholesaling apply equally to the prohibition "in respect of sale by retail both for groceries and for meats" (286 U.S. at 117).

The difficulty which the Government and the district court now have is that they are unable to comprehend the significance of the vast changes which have swept through the food field since the 1930's. They cannot project themselves back to a bygone era when control over a nation-wide branch house and car route system could endanger competition at every level of the food industry. As a result, they find the broad prohibitions against manufacturing, wholesaling and retailing more sweeping than at present

[4] Although paragraph Eighth on fresh milk and cream was not then before the Supreme Court, it merely adds one more category of prohibited commodities to those of paragraph Fourth.

seems warranted by the former dangers. Yet, there is no doubt that in 1920 and 1930, the advantages afforded appellants by their far-flung meat distribution systems, adaptable as they then were to groceries with no increase of overhead, were of controlling importance to their entry into the grocery field. Not only is this revealed by the Government's own complaint, but as the Government itself stated in its brief to this Court in 1932 (Gov't S. Ct. Brief, 1932, 27):

> "The Government's bill must also be read in the light of the charges made in the preceding report by the Federal Trade Commission on the meat-packing industry. In its letter to the President transmitting its Summary of this report, the Commission said:
>
> > 'If these five great concerns owned no packing plants and killed no cattle and still retained control of the instruments of transportation, of marketing, and of storage, their position would not be less strong than it is. (65th Cong., 2d Sess., H. R. Doc. 1297, p. 4.)'"

Furthermore, it must be remembered that in 1920 appellants had allegedly eliminated all competition in meat and thus could employ their monopoly power as a lever in the grocery field. While by 1930, their monopoly had been broken, retailers and others remained dependent on them for meat supplies, with the resultant danger of unfair pressures at the retail and wholesale level. Today, however, the complete adequacy of alternative, non-defendant sources for meat is beyond question, and the former danger of tying abuses was laid to rest by the Government stipulation at trial that appellants do not condition the sale of their meats upon the purchase of non-prohibited grocery products.

Clearly, the changes which 40 years have brought to every level of the food industry do not entitle either the district court or the Government to change the ground for the decree provisions to something now more plausible to them in order to prevent modification. They should have no more liberty than the appellants to subject the injunction (in the language of the 1932 *Swift* opinion) to "impeachment in its application to the conditions that existed at its making" (286 U.S. at 119).

The Government's reliance upon this Court's opinions in *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950), and *International Salt Co. v. United States*, 332 U.S. 392 (1947), for the proposition that the complaint can be ignored in determining reasons for a consent decree is misplaced (Gov't Motion 15-16). These opinions do not deal with consent decree modification, but merely sustain the power to issue injunctions which are broader in scope than the precise abuses found. Considered accurately, they aid understanding of how paragraph Fourth of the decree could be, and was, based upon the distribution advantage. For paragraph Fourth is an example of the authority, as stated in the *U. S. Gypsum* case, to "range broadly" through practices connected with illegal acts and to prohibit otherwise lawful activity so as to dissipate a past restraint (340 U.S. at 89).

3. The unprecedented abandonment of the complaint reasons for the decree led the district court, at the urging of the Government, to hold that the decree provisions in question were really bottomed on appellants' large size as meat packers. On this theory, appellants could not have relief as long as they continued to be large meat packers. Since the evidence showed continued substantial

size,[5] it followed automatically that modification was denied, and this principle was applied even as to Cudahy with only 2.4% of the U. S. commercial slaughter.

There is no support in the 1932 *Swift* opinion for the Government's size theory. The Government's argument can be made only by lifting Mr. Justice Cardozo's remarks on size completely out of the context of the dangers of anti-competitive abuse which he held were then existing and which gave relevance to his discussion of size. By contrast, the record in the present case affirmatively shows that those dangers no longer exist and that the appellants' position in the meat industry, under modern economic conditions, gives them no advantage in the sale of groceries. In fact, as pointed out more fully in the jurisdictional statement (11-16), appellants have found it necessary to divorce from their fresh meat operations the manufacture, distribution and sale of the few grocery

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[5] While not of critical importance under the legal principles which appellants contend should be applied to this proceeding, the Government's presentation of certain data on appellants' size cannot be entirely passed without making needed corrections. The motion (6-8) continues the district court's error of aggregating for all appellants certain statistics on slaughter and other matters as if appellants were one firm, contrary to the court's own finding that the old combination was ended long ago (see Juris. State. 27).

Further, the motion states (6-7) that "in 1956 the appellants accounted for nearly 40% of the total commercial slaughter of livestock in the United States (GX 2), with substantial increases since 1920 in every species except cattle (GX 5-A, 5-B, 5-C, 5-D)." However, appellants, even combined, today, account for only approximately 27% of total commercial slaughter (AX 54; CX 43; SX 46). Further, this sentence gives the misleading impression that the *percentage* of total slaughter accounted for by appellants substantially increased since 1920 as to all but one species, whereas the exhibits cited show that the percentages declined in each species but one, calves, with a very drastic decline in the largest species, cattle. Moreover, the Government is silent about the undisputed fact that Cudahy has lost more than one-half of its industry position since the modification proceedings of 1930, Armour more than one-third and Swift more than one-fifth (Juris. State. 18).

items which are permitted to them by the decree. Moreover, their record of performance in these non-meat grocery items clearly shows a lack of any advantage; their market shares in these products have suffered substantial declines (Juris. State. 15).

The only allegedly adverse consequences from appellants' size referred to by the Government in its motion are those contained in three sentences in the district court's 57-page opinion (Op., App. 1-57), which the Government calls two "sets of findings" (Gov't Motion 11). In these, the district court stated that by virtue of their size as meat packers, the appellants would enjoy certain competitive advantages as food retailers and as full-line wholesalers. It did not refer to any evidence in support of these conclusions, nor did it give any other reasons for them. The Government takes no issue with appellants' assertion that these conclusions, upon which the Government relies so heavily, were mere presumptions derived entirely from evidence of appellants' size and resources as meat packers (Juris. State. 27). Indeed, the Government's search of the record has led it to admit that they were reached "on the basis of this evidence" (Gov't Motion 8).

These conclusory observations of the district court are strikingly at variance with the undisputed evidence, and with the specific factual findings which the court did make. For example, the court's observation that if the appellants were free to sell groceries and fresh milk and cream, they would obtain alleged "competitive advantages" from "combined managerial and sales staffs" (Op., App. 55), is contradicted by the immediately preceding findings that appellants' "existing distributive facilities would not afford any substantial advantage in the distribution of groceries along with meats" and that the "permitted grocery items

sold by the defendants are being distributed to an increasing degree independently of meats, through separate units of the business" (Op., App. 55). The assumption that appellants would enjoy any competitive advantages in today's radically changed grocery industry is unsubstantiated, and in fact contradicted, by the court's own findings and by undisputed evidence. Thus, for example, retailing is now dominated by large and efficient supermarkets and is almost completely integrated with wholesaling, modern wholesalers have extended their operations into meats as well as groceries, and large and efficient competitors now exist at every level of the food industry (Juris. State. 11-20).

The Government is in error in asserting that appellants do not directly attack the district court's conclusory inferences (Gov't Motion 11). Their factual validity is directly challenged. In the Questions Presented (Juris. State. 3-4), issue is taken with the district court's conclusion that "appellants' size is synonymous with the danger of competitive abuse," and that the Supreme Court's decision in the *Swift* case, "deprived the court of discretion to modify the decree as long as appellants continue to be large meat packers." The findings and evidence which refute the district court's conclusions are described in the jurisdictional statement (11-20), and will be fully summarized for the Court at the appropriate time.

4. The Government's motion, like the opinion below, also puts in issue the important question of whether modification may properly be granted when the injunctive restraints are no longer needed as a protection to free competition, or whether a court must additionally find extreme and unexpected hardship resulting to the defendant. The issue is of crucial importance not only in this case, but in the judicial supervision of the hundreds of other antitrust consent decrees now in force. Yet the

district court's ambivalent standard that lack of need and hardship are "correlative elements" leaves the issue in great doubt.

The Government seeks to avoid a resolution of this question by this Court by contending that it is unnecessary to this decision. However, the Government is manifestly incorrect in asserting that no question is presented. Determination by this Court that there is no need for the decree provisions will unavoidably confront the Court with the necessity for deciding whether this is legally sufficient for modification.

Secondarily, the Government has advanced the contention that both hardship and lack of need must be shown, since the *Swift* opinion "phrased the issue," according to the Government (Gov't Motion 16), in terms of whether "the restraints of the injunction, however appropriate and just in February, 1920, were now useless and oppressive" (286 U.S. at 113). But the fact is that this language was merely the Court's restatement of the two alternative grounds for relief advanced by the defendants in 1932; it clearly was not an adoption of a conjunctive standard. Indeed, later language in the opinion, as well as sound principles of equity jurisprudence, should have made it clear both to the Government and to the district court that a showing of hardship is uncalled-for when changed circumstances have eliminated all antitrust reasons for the decree. This principle should properly be reaffirmed by this Court.

CONCLUSION

Clearly, substantial and important questions are presented on this appeal. To grant the Government's motion for summary affirmance is to deny the appellants any review at all, despite the obvious importance of this case

and of the issues it raises. As this Court recently observed in *United States v. E. I. du Pont de Nemours and Co.*, 29 U.S.L. Week 4434, 4436 (May 22, 1961):

> "Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination. This circumstance imposes a special burden upon us, for, as Mr. Justice Roberts said for the Court, '... it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him.' *Hartford-Empire Co. v. United States*, 324 U.S. 570, 571 (1945), clarifying 323 U.S. 386 (1945)."

We submit that the questions tendered by this appeal are clearly substantial and require full review on briefs and oral argument. The motion to affirm should be denied and probable jurisdiction should be noted.

Respectfully submitted,

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June 1961

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 575

SWIFT & COMPANY, ARMOUR AND COMPANY, and THE CUDAHY PACKING COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Northern District of Illinois

OBJECTION OF APPELLANTS TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 875

SWIFT & COMPANY, ARMOUR AND COMPANY, and THE CUDAHY PACKING COMPANY, et al., *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Northern District of Illinois

OBJECTION OF APPELLANTS TO MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Pursuant to Paragraph 3 of Rule 42 of the Revised Rules of the Supreme Court, appellants herein respectfully submit their reasons for withholding consent to the filing of a brief as amici curiae by Western States Meat Packers Association, Inc., Texas Independent Meat Packers Association, Luer Packing Company, Pacific Meat Company, Inc., McFarland, Inc., and Modesto Meat Company.

The movants can contribute nothing to the Court's full consideration of this case that the Government cannot contribute. Movants concede that the Government was comprehensive in its opposition to modification in the trial of the instant petitions, and there is no reason to assume that the Government would be any less comprehensive in asserting its opposition on appeal. The movants contend

(pp. 2-3), however, that they constitute a class protected by the decree, and that their interest is not adequately protected by the Government, because the Government represents the interest of the general public.

Appellants believe that the public interest in free competition, as protected by the antitrust laws, is the only interest appropriately to be considered in this case. To the extent that the interest of the movants coincides with the public interest, it is adequately represented. To the extent that their interest differs, it is not entitled to representation.

Respectfully submitted,

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